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"antiquity, either in terms or opinions, as may stand with truth, and the proficience of know-
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NEW COMMENTARIES
ON
THE LAWS OF ENGLAND.

BOOK II.
OF RIGHTS OF PROPERTY—(*continued*).

PART II.
OF THINGS PERSONAL.

THE subjects of property were divided, as we may recollect, into things real, and things personal (*a*). The first of these being now sufficiently discussed—so far at least as concerns the division of rights, as distinguished from wrongs (*b*),—we proceed to the consideration of the second.

(*a*) Vide sup. vol. I. p. 167.

(*b*) Ibid. p. 136.

CHAPTER I.

OF THINGS PERSONAL IN GENERAL, AND OF
PROPERTY THEREIN.

“THINGS personal” fall under the larger and more general denomination of *chattels*, or *goods and chattels* (*a*)—the term “chattel” being also applicable to any interest in land which does not amount to freehold, and which we have had already occasion to examine in former chapters, under the appellation of *chattels real* (*b*). With these last, however, we have not at present any direct concern. For these are not properly the *subjects* of property, but rather modifications of property, or species of estates in a certain kind of subjects, viz. in things real. When considered, indeed, in reference to the distinction between real and personal *estate*, they are held to fall under the latter denomination, their incidents being in general the same with those of property in moveables; but as regards the distinction between *things* real and *things* personal, they appertain to the division of things real, and have consequently been allotted to the First Part of the present Book. Things personal, therefore, to which our present attention is invited, include only *moveables*, and the rights connected with them; which, as put in contradistinction to chattels real, sometimes receive the appellation of *chattels personal* (*c*).

[Things personal then (so understood) comprise in the first place all sorts of things moveable, which may attend

(*a*) Co. Litt. 118 b; Ryal v. Rolle, Biens, D. 2; vide sup. vol. I. pp. 167,
1 Atk. 183. 280.

(*b*) Co. Litt. ubi sup.; Com. Dig. (*c*) Co. Litt. ubi sup.

[a man's person wherever he goes; and, being of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and immoveable,—as lands and houses and the profits issuing thereout. Hence, these last were the principal favourites of our first legislators, who took all imaginable care in ascertaining the right, and directing the disposition of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them: but at the same time entertained a very low and contemptuous opinion of all personal estate; which they regarded as only a transient commodity. The amount of it indeed was comparatively very trifling during the scarcity of money, and the ignorance of luxurious refinements, which prevailed in the feudal ages. Hence it was that a tax of the *fifteenth, tenth*, or sometimes a much larger proportion of all the moveables of the subject, was frequently laid without scruple; and is mentioned with much unconcern by our antient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the frequent forfeitures inflicted by the common law of *all* a man's goods and chattels, for misbehaviour and inadvertences that at present hardly seem to have deserved so severe a punishment. Our antient law books, which are founded on the feudal provisions, do not therefore often condescend to regulate personal property. There is not a chapter in Britton or the Mirrour that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton and Fleta, seems principally borrowed from the civilians. But in modern times, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, have greatly augmented its quality and value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly if not quite equal to

[his realty; and have adopted a more enlarged and less technical mode of considering the one than the other, frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well grounded, and apposite to the case in question; but principally from reason and convenience, adapted to the circumstances of the times.

Moveables consist primarily of *inanimate* things, as goods, plate, money, jewels, implements of war, garments and the like; or vegetable productions, as the fruit or other parts of a plant, when severed from the body of it, or the whole plant itself when severed from the ground. And these require, for the present, no particular remark. But under the same division of moveables we have also to arrange *animals*—which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another. And as to these, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations.

They are distinguished into such as are *domitæ* and such as are *feræ naturæ*; some being of a *tame*, and others of a *wild* disposition. In such as are of a nature tame and domestic—as horses, kine, sheep, poultry, and the like—a man may have as absolute a property as in any inanimate beings; as they continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property in them.] And, accordingly, to steal any of these is felony both at common law and by statute (*e*). But with animals *feræ naturæ*, the case is different. These are, generally speaking, not the subjects

(*e*) See, in particular, 24 & 25 Vict. c. 96, by which Act to steal any of the domestic animals enumerated in sect. 10, is made punishable by penal servitude to the extent of

fourteen years, or imprisonment with or without hard labour and solitary confinement to the extent of two years.

of absolute property, at least while living (*f*). Yet, under certain circumstances, a man may be invested with a qualified or special property in animals *feræ naturæ*; and this either *per industriam*, *propter impotentiam*, or *propter privilegium*.

1. [Such a property may arise in them *per industriam*—by *reclaiming* and making them tame by art, industry and education; or by so *confining* them that they cannot escape and use their natural liberty (*g*). And under the head *feræ naturæ* some writers have ranked all the domestic animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom, as horses, swine, and other cattle: which, if originally left to themselves, would have chosen to rove up and down seeking their food at large, and are only made domestic by use and familiarity; and are, therefore, (say they,) called *mansueta*, *quasi manui assueta*. But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be between such animals as we see generally tame, and are therefore seldom, if ever, found wandering at large, that is to say, animals *domitæ naturæ*; and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*: though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man; such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, fish in a private pond, bees when hived, and the like (*h*).]

(*f*) See *Hannam v. Mockett*, 2 B. & C. 934; 4 D. & R. 518.

(*g*) Vide post, p. 19.

(*h*) Blackstone (vol. ii. p. 392) remarks, that the property in bees, which are *feræ naturæ*, arises only by reason of their reclamation or hiving, and that this is so both in the

civil law (see Puff. l. iv. c. 6, s. 5; Inst. ii. 1, 14) and also according to our own Bracton (L. ii. c. 1, s. 3). He adds: "though a swarm lights
"upon my tree, I have no more
"property in them till I have hived
"them, than I have in the birds.
"which make their nests thereon;

To what has been said, it may be useful to add the observation, that though animals *feræ naturæ* may thus become the subject of a qualified property, either by being simply kept in confinement on a man's estate, as in deer kept in a park,—or by being actually reclaimed and domesticated, as in the instance of a tame pigeon,—yet in the former case they do not fall properly under the description of things or chattels personal, but are accessory to and partake of the nature of the *realty*; and therefore, if the owner die seised of an estate of inheritance in the land without having disposed of it by will, they will, as the general rule, descend with the inheritance to the heir, instead of belonging to the personal representatives of the deceased (*i*). [Moreover it is material to remark, with respect to all animals *feræ naturæ*, that they are no longer the property of a man than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless indeed they have *animus revertendi*—which is only to be known by their usual custom of returning (*k*),—or unless instantly pursued by the owner, for during such pursuit his property remains (*l*).] On the other hand, however, a pro-

“and therefore if another hives
 “them, he shall be their proprietor;
 “but a swarm which fly from and
 “out of my hive are mine, so long
 “as I can keep them in sight and
 “have power to pursue them; and
 “in these circumstances no one
 “else is entitled to take them.
 “But it hath been also said, that
 “with us the only ownership in
 “bees is *ratione soli*, and the Charta
 “de Forestâ, which allows every
 “freeman to be entitled to the honey
 “found within his own woods,
 “affords great countenance to this
 “doctrine,—that a qualified property
 “may be had in bees, in considera-
 “tion of the property of the soil

“whereon they are found.” (Bro.
 Ab. tit. Propertie, 43 Edw. 3, c. 24;
 9 Hen. 8, c. 13, sup. vol. I. p. 667.)

(*i*) Co. Litt. 8; Case of Swans,
 7 Rep. 17 b; 2 Bl. Com. 428; Toll.
 Exors. 192. It has been held, how-
 ever, as to *deer*, that they are capa-
 ble of being so reclaimed as to pass
 to the executors, as personal pro-
 perty. (See *Morgan v. Abergavenny*, 8 C. B. 768.)

(*k*) Bract. l. ii. c. 1; Case of Swans,
 7 Rep. 15 (b). This doctrine of the
animus revertendi is borrowed, as
 Blackstone (vol. ii. p. 392) remarks,
 from the civil law. (See Inst. ii. 1,
 15.)

(*l*) 2 Bl. Com. 392.

perty of this description is protected, while it lasts, by law; so that an action will lie against any man who detains any animals *feræ naturæ* from the owner for the time being, or who unlawfully destroys them (*m*). It is also felony to steal those animals *feræ naturæ*, which, being fit for the food or service of man, are either tame and known by the thief to be so, or are so confined that the owner can take them whenever he pleases (*n*). [But it is otherwise with respect to those which the common law held to be only kept for pleasure, curiosity, or whim—as dogs, bears, cats (*o*), apes, parrots, and singing birds (*p*),—because their value is not intrinsic, but depends only on the caprice of their owner (*q*).] By modern legislation, however, efficient protection is given to property in confined animals, such as are not the subject of felony. For by 24 & 25 Vict. c. 96, s. 21 (*r*), it is

(*m*) Bro. Abr. Trespass, 407.

(*n*) 1 Hale, P. C. 511, 512; 2 Bl. Com. 390; Hawk. b. i. c. 33, s. 26. So, a *stock* of bees may, it seems, be the subject of larceny at the common law. (Tibbs v. Smith, T. Raym. 33. And see per cur. in Hannam v. Mockett, 2 Barn. & Cress. p. 944.)

(*o*) Blackstone (vol. ii. p. 394) informs us that among our elder ancestors, the antient Britons, *cats* were looked upon as creatures of intrinsic value; and that the killing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the royal household and was the *custos horrei regii*; in which case there was a very peculiar forfeiture; for in such case "*felis summâ caudâ suspendatur, capite aream attingente, et in eam granatritici effundantur, usque dum summitas caudæ tritico cõoperiatur.*" (Wotton, LL. Wall. l. 3, c. 5, s. 5.) Blackstone adds that, according to Sir E. Coke (7

Rep. 156), there was antiently a similar amercement for stealing swans; only that these were suspended by the beak instead of the tail.

(*p*) Lamb. Eiren. 275. See R. v. Robinson, 28 L. J. (M. C.) 58. Blackstone (vol. ii. p. 394) observes that to steal a reclaimed *hawk* is felony both by common law and statute (see 37 Edw. 3, c. 19, repealed by 7 & 8 Geo. 4, c. 27), and that this seems to be a relic of the tyranny of our antient sportsmen. As to stealing hawks, see also 1 Hale, P. C. 512; 1 Hawk. P. C. 38.

(*q*) 3 Inst. 109. So, too, it has been decided that *ferrets*, though tame, are of too base a nature to be the subject of larceny; see 2 East, P. C. 614; R. v. Searing, Russ. & Ry. C. C. 350; 1 Chit. Pract. of Law, p. 18, n. (z).

(*r*) Re-enacting in substance 7 & 8 Geo. 4, c. 29, s. 31, repealed by 24 & 25 Vict. c. 95. As to stealing

provided generally, that whosoever shall steal, or wilfully kill with intent to steal, “any bird, beast or other animal, ordinarily kept in a state of confinement, *not being the subject of larceny at common law*,” shall, on conviction before a justice, be either sentenced to be imprisoned, with or without hard labour, for any term not exceeding six months; or else be adjudged to forfeit over and above the value of the animal such sum of money, not exceeding 20*l.*, as to the justice shall seem meet: and, for a subsequent offence, may be sent to prison with hard labour for any term not exceeding twelve months. And as to *dogs* in particular, it is by the same Act provided (sects. 18, 19), that any person stealing one—or having one in his possession knowing it to have been stolen—may on conviction before two justices be imprisoned, with hard labour, to the extent of six months; or forfeit, above the value of the dog, a sum of money not exceeding 20*l.*: and, on a second offence, shall be guilty of a misdemeanor, and liable, at the discretion of the court before which he shall be convicted, to imprisonment, with or without hard labour, to the extent of eighteen months.

2. [There may also be a qualified property in animals *feræ naturæ, propter impotentiam*, on account of their own inability. Thus, where hawks, herons, or other birds build in my trees, or coneys or other creatures *feræ naturæ* make their nests or burrows in my land, and have young ones there;—here I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires(*s*): but till then, it is in some cases trespass, and in others felony, for a stranger to take them away(*t*). For here the law vests a property in the owner of the land in respect of the young, in the same manner as it does of

or killing *deer*, see, also, 24 & 25 Vict. c. 96, ss. 12, 13; as to *pigeons*, ib. s. 23 (and see *Taylor v. Newman*, 4 B. & Smith, p. 89); as to *fish*, ib. s. 24.

(*s*) *Charta de Forestâ*, 9 Hen. 3, c. 13. See per Willes, J., in *Blades v. Higgs*, 12 C. B., N. S. p. 504.

(*t*) *Case of Swans*, 7 Rep. 17; *Lamb. Eiren.* 274.

[the parents, if reclaimed and confined: for these cannot, through weakness, any more than the others through restraint, use their natural liberty, and forsake him.

3. A man, lastly, may have a qualified property in animals *feræ naturæ, propter privilegium*; that is, he may have the privilege of hunting, taking and killing certain animals *feræ naturæ*, in exclusion of other persons. Here he has a transient property in these animals (usually called *game*), so long as they continue within his liberty (*u*), and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.] The nature of this privilege is more fully explained in other parts of this work (*x*).

We must, however, further remark, that just as things real comprise not only the land itself, but also such incorporeal rights as issue out of or are connected with it (*y*); so things personal include not only those tangible subjects of property which are capable of locomotion, but also the incorporeal rights or interests which may grow out of or be incident to them. This class (to which, without impropriety, may be assigned the term of *incorporeal chattels*) comprehends, among other species, *patent right*, or the exclusive privilege of selling and publishing particular contrivances of art: and *copyright*, or the exclusive privilege of selling and publishing particular works of literature,—subjects to which we shall advert with more particularity hereafter (*z*).

Things (or chattels) personal being thus distinguished and distributed, it may be proper to consider, first, the *nature* of that property, or dominion, to which they are liable; and, secondly, the *title* to that property, or how it may be lost and acquired. To the first of these subjects

(*u*) Child *v.* Greenhill, Cro. Car. 554; Mar. 48; Sutton *v.* Moody, 5 Mod. 376; 12 Mod. 144.

(*x*) Vide sup. vol. I. p. 669, et post, p. 22.

(*y*) Vide sup. vol. I. pp. 170, 647.

(*z*) Vide post, p. 25.

we propose, therefore, to devote the remainder of the present chapter.

Property in chattels personal may be either in *possession*, or else in *action*. Property in possession is where a man has the enjoyment, either actual or constructive, of the thing or chattel; and is divided into two sorts, an *absolute* and a *qualified* property: the former being where a man is fully and completely the proprietor of the thing, the latter where his ownership is of a special or limited kind; and that either in reference to the peculiar circumstances of the subject-matter, it not being capable of being under the absolute dominion of any proprietor,—or on account of the peculiar circumstances of the owner, though the thing itself is very capable of absolute ownership. Of qualified or special property in the former sense of the term,—as exemplified in the case of animals *feræ naturæ*,—we have already spoken. [In the latter sense, it may be illustrated by the case of *bailment*, or delivery of goods to another person for a particular use, as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like;—here there is no absolute property in either the bailor or the bailee, the person delivering or him to whom it is delivered:—for the bailor hath only the right, and not the immediate possession—the bailee hath the possession and only a temporary right: but it is a qualified property in them both; and each of them is entitled to an action against any stranger by whom the goods are wrongfully damaged or taken away; the bailee on account of his immediate possession, the bailor on account of his general ownership (*a*).] The same may be said of the case where goods are acquired by *finding*. The finder has a special property; defeasible, it is true, upon discovery of the right owner, but in the meantime valid against the rest of the world (*b*). Upon the same principle, too, if the goods of

(*a*) 2 Saund. 47 b.

(*b*) *Armoury v. Delamirie*, Str. 505.

a judgment debtor are taken in execution to satisfy the judgment, the sheriff who executes the legal process has a special property in them during the interval between seizure and actual sale (*c*). [On the other hand, a servant who hath the care of his master's goods and chattels—as a butler of plate, a shepherd of sheep, and the like—hath not any property or possession either absolute or qualified; but only a mere charge or oversight, and his master's property remains absolute (*d*).] And so, when goods are distrained for rent, no property, special or otherwise, is acquired in them by the party distraining or seizing (*e*); but they remain *in custodiâ legis* until sold, or otherwise lawfully disposed of, and in the meantime the property of the original owner remains in him unaltered.

Having thus considered the divisions of property in *possession*, we will proceed next to take a short view of the nature of property in *action*; which is where a man has not the enjoyment (either actual or constructive) of the thing in question, but merely a right to recover it by a suit or action at law; from whence the thing so recoverable is called a thing (or *chose*) *in action*. Thus money due on a bond is a *chose in action*, for a right to claim the money vests whenever it becomes payable; but there is no possession, till recovered by course of law, unless payment be first voluntarily made. [And so, if a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose in action*; for though a right to some recompense vests in me at the time of damage done, yet what and how large such recompense shall be, can only be ascertained by verdict, and the possession can only be given me by legal judgment and execution (*f*). A *chose*

(*c*) *Wilbraham v. Snow*, 2 Saund. 47; *Giles v. Grover*, 9 Bing. 128.

(*d*) 3 Inst. 108.

(*e*) 2 Saund. by Wms. & Pat. 47, n. (*c*).

(*f*) According to Blackstone, (vol. ii. p. 397,) "All property *in action* depends entirely upon *contract*, either express or implied." But it has been justly remarked, that the

[*in action*, then, is a thing rather *in potentiâ* than *in esse*; though the owner may have as absolute a property in, and be as well entitled to, such things in action, as to things in possession.]

Property in chattels personal is also subject, whether it be in possession or in action, to distinctions which regard the *quantity* of interest. For a man may have the total property or entire dominion of a chattel, analogous in some respects to the fee simple in a real estate (*g*); or he may be the owner of it for life, or for years only (*h*). Personal chattels also, like land, are subject to distinctions with respect to the *time of enjoyment* and the *number of the owners*; and on these two latter points it may be desirable to enlarge a little, before the conclusion of the chapter.

[First, as to the *time of enjoyment*. By the rules of the antient common law, there could be no future property to take place in expectancy created in personal goods and chattels, because being things transitory, and by many accidents subject to be lost, destroyed or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion—as it was thought—perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitation in remainder were *generally* tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels in remainder, after a bequest for life, were

term *chose in action* has a more extensive application, and extends to the right to recover *damages* for a *wrong*, independently of any contract between the parties. (1 Chit. Pract. Law, p. 99, n.)

(*g*) One remarkable difference, however, between property in chattels personal and property in real estate, consists in the absence in the former of all those incidents which result from the doctrine of *tenure*,

as explained in our first volume.

(*h*) But if a chattel personal be given by deed or will to A. and the *heirs of his body*, the total property is vested in A., and the remainders over take no effect; for there can be no *estate tail* in a personal chattel. (*Seale v. Seale*, 1 P. Wms. 290; 2 Bl. Com. 398. See also, *Holloway v. Webber*, Law Rep., 6 Eq. Ca. 523.)

[permitted (*i*); though originally that indulgence was only shown when merely the *use* of the goods, and not the goods themselves, was given to the first legatee (*k*); the property being supposed to continue all the time in the executor of the testator. But now these distinctions are disregarded (*l*); and therefore if a man, either by deed or will, limits his books or furniture to A. for life, with remainder over to B., this remainder is good (*m*).] Personal chattels, however, cannot be rendered in any instance unalienable beyond the period prescribed in the case of real estate by the law against perpetuity (*n*): and they also fall equally with real estate within the provisions of 39 & 40 Geo. III. c. 98; the general effect of which is (we may remember) to invalidate all directions, whether by will or other instrument, for the accumulation of the annual produce of property for any longer period than the life of the settlor, and twenty-one years after his death (*o*).

In every case it is obvious that the interest of the party in remainder, in personal chattels, is in its nature precarious. But the Court of Chancery has always interfered for his protection (*p*); and if the tenant for life should begin or threaten to injure the property, he may be restrained by an injunction from so doing, and such further remedy will be applied as the nature of the case may require (*q*).

(*i*) *Upwell v. Halsey*, 1 P. Wms. 652.

(*k*) Mar. 106.

(*l*) 2 Freem. 206; *Randall v. Russell*, 3 Meriv. 195; 2 Roper, Leg. 393.

(*m*) It seems open to doubt, however, whether a limitation by *deed* would be valid without the intervention of trustees; see Coleridge's *Blackstone*, vol. i. p. 398; *Fearne*, Cont. Rem. 402, 9th edit.

(*n*) Co. Litt. by Harg. 20 a, n. (5); *Gilb. Us. by Sugd.* 121, n. (4); 2 Rop. Leg. 390. As to perpetuity,

vide sup. vol. i. p. 552.

(*o*) Vide sup. vol. i. p. 555.

(*p*) *Fearne*, Cont. Rem. 406, 9th edit.

(*q*) An injunction is a remedy which, until the statute of 17 & 18 Viet. c. 125, could be obtained *only* from a court of equity. By that Act, however, it was in certain cases made obtainable, also, in a court of law. These distinctions will cease on the Judicature Act, 1873 (36 & 37 Viet. c. 66), coming into operation on the 2nd November, 1874.

Next as to the *number of owners*. Things personal, as well as things real, may belong to their owners, not only in severalty, but also in joint tenancy and in common. They cannot, indeed, be vested in coparcenary, because they do not descend from the *ancestor* to the *heir*, which is necessary to constitute coparceners, but, (in case of intestacy of a sole owner,) devolve to his administrator, to be by him distributed—though subject to the claims of creditors—among the next of kin. But they otherwise follow, in general, the same rules as to those modifications of estate which regard the number of owners, as things real. [Thus, if a horse or other personal chattel be given to two or more absolutely, they are joint tenants thereof; and unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements (*r*); and in like manner if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship (*s*): and so also if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common (*t*), as we have formerly seen the same words to have done in regard to a devise of real estate (*u*). But (as an instance, on the other hand, of the failure of the analogy of things personal to things real in regard to joint tenancy) it is proper to remark, that, for the encouragement of husbandry and trade, it is held that stock on a farm, though occupied jointly, and also stock used in a joint undertaking by way of partnership in trade, shall always be considered as common, and not as joint property, and there shall be no survivorship therein (*x*).] This, however, is to be understood as applying, at law, only to such property when in *possession*, and not to *choses in*

(*r*) Litt. s. 281; Shore *v.* Billingsly, 1 Vern. 482.

(*s*) Litt. s. 321.

(*t*) 1 E.1. Ca. Ab. 292.

(*u*) Vide sup. vol. I. p. 353.

(*x*) See Buckley *v.* Barber, 6 Exch. 169.

action; for where one of several partners, having a legal interest in a contract, dies, the right of action upon it has been held in the courts of law to accrue to the survivor or survivors, in whose name alone the action must be brought; and the representative of the deceased has been compelled to have recourse to chancery, in order to obtain the share of the latter in the sum recovered (*y*).

It remains to add that, as in the case of things real, so in that of things personal, the legal property may be vested in one man, to the *use* of or in *trust* for another; whose interest, as being that of the beneficial and substantial owner, will be recognized and protected in the courts of equity. But as regards things personal, this division of the ownership is less frequent, (the legal interest being, in general, also a beneficial one); and they are in no instance affected by the Statutes of Uses, or by any of its attendant learning.

(*y*) See *Anderson v. Martindale*, 1 East, 497; 2 Chit. Blackst. 399, n. (15); *Crossfield v. Such*, 8 Exch. 825. It is apprehended that no

such necessity will exist when the Judicature Act, 1873 (36 & 37 Vict. c. 66), comes into operation on the 2nd November, 1874.

CHAPTER II.

OF TITLE TO THINGS PERSONAL—AND FIRST OF
TITLE BY OCCUPANCY.

WE are next to consider the *title* to things personal, or the various means of acquiring and of losing such property as may be had therein (*a*); both which considerations of gain and loss shall be blended together in one and the same view,—as was done in our observations upon real property,—since it is, for the most part, impossible to contemplate the one without contemplating the other also. And the means which we shall have occasion to consider, under this division of the work, are six. 1. By occupancy. 2. By invention. 3. By gift and assignment. 4. By contract. 5. By bankruptcy. 6. By will and administration (*b*).

[And, first, a property in goods and chattels may be acquired by *occupancy*; which, we have more than once remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged by the positive law of society, in order to maintain peace and harmony among mankind (*c*). For this purpose, gifts and contracts, testaments, legacies and administrations, have been introduced and countenanced by the laws of England, in order to transfer and continue that property and possession in

(*a*) Vide sup. p. 10.

(*b*) Blackstone (vol. ii. p. 400) enumerates six others, viz., title by *prerogative*, by *forfeiture*, by *custom*, by *succession*, by *marriage*, and by *judgment*; but these, being

only of an incidental description, seem to belong more naturally to other general heads, under which they will be found in this work.

(*c*) Sup. vol. i. pp. 153, 448.

[things personal, which has once been acquired by the owner; and where such things are found without any other owner, they for the most part belong to the sovereign, by virtue of the royal prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

1. Thus in the first place it hath been said, that anybody may seize to his own use such goods as belong to an alien enemy (*d*). For such enemies, not being looked upon as members of our society, are not entitled, during their state of enmity, to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to seize upon their chattels without being compelled, as in other cases, to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state residing in the crown (*e*); and, as regards inland seizures, to such goods as are brought into this country by an alien enemy, after declaration of war, without a safe conduct or passport. And therefore it hath been holden, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized (*f*);] and if a contract be made with a foreigner during peace, the right of action upon it is not absolutely forfeited by the occurrence of a war between his country and ours, though it is suspended until peace be restored (*g*). But where the circumstances of the case render the capture from an enemy legal, it is a title that will sometimes prevail, even against the claim of

(*d*) Finch, L. 178. As to aliens, vide sup. vol. I. pp. 134, 477; post, bk. IV. pt. I. c. II.

(*e*) The King *v.* Williamson, Freem. 40; Brymer *v.* Atkins, 1 II. Bl. 189.

(*f*) Bro. Ab. tit. Propertie, 38, Forfeiture, 57.

(*g*) See Antoine *v.* Morshead, 6 Taunt. 239; Alcenous *v.* Nigreu, 4 Ell. & Bl. 217; Clementson *v.* Blessig, 11 Exch. 135.

a former British owner, from whom the goods may have been previously taken by the same enemy. For in such cases of recapture the law of this country has been adjudged to be, that they become vested in the recaptor, unless they be retaken on the same day that they were first taken, and the owner before sunset puts in his claim of property (*h*). And that doctrine is agreeable to the law of nations, as understood in the time of Grotius (*i*); though later authorities require that, before such goods become the property of the recaptors, they must have been brought into port, and have continued a night *intra præsidia* in a place of safe custody (*k*): and in order fully to vest recaptured goods in the captors, so as to bar the original owner, it is also necessary that the vessel should have been condemned *as prize*, by legal sentence (*l*). In addition to which we may remark, that as regards ships or goods taken and retaken at sea, and in questions arising thereon between the original British owner and a British recaptor, the law as established by statute now is, that whatever period of time may have intervened between the capture and the recapture, and whether sentence of condemnation shall have been obtained or not, the property is to be restored to the original owners, on payment of *salvage* or money in lieu of salvage (*m*). The whole subject, however, of acquiring property in things personal by capture from an enemy, is in general foreign to the province of the ordinary courts of law; and belongs to the jurisdiction of the *Prize Court*, a court sitting to determine all such questions, under a particular commission from the crown (*n*).

(*h*) 2 Bl. Com. 401; Bro. Ab. tit. Propertie, 38, Forfeiture, 57.

(*i*) De Jure B. ac P. l. 3, c. 6, s. 3.

(*k*) Bl. Com. ubi sup.; Bynkersh. Quæst. Jur. Pub. b. 1, c. 4; Rocce. de Assecur. not. 66.

(*l*) See 2 Chit. Bl. 401, n. (4); 1 Rob. Rep. 139; 3 ibid. 97; Wil-

son v. Foster, 6 Tannt. 25; 1 Kent, Com. 97.

(*m*) 2 Chit. Bl. ubi sup. cites 2 Burr. 1198; 1 Bl. Rep. 27; 43 Geo. 3, c. 160. As to the case of a recapture from *pirates*, see 13 & 14 Vict. cc. 26, 27.

(*n*) 3 Bl. Com. 108. See Le

2. [Again, with regard to animals *feræ naturæ*, all mankind had, by the original grant of the Creator, a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field; and this natural right still continues in every individual, unless so far as it is restrained by the civil laws of the country (*o*).] By the laws of this realm, accordingly, all persons may, on their own lands, or in the seas, in general exercise this right. And when a man has once seized animals of this description, they become, if reclaimed or confined, (according to the doctrine laid down in a former chapter,) his *qualified* property, or, if dead, *absolutely* his own (*p*); so that to steal them, or otherwise invade his property therein, is, according to the nature of the case, sometimes a criminal offence, sometimes only a civil injury.

But in this country, as in many others, the right to take animals *feræ naturæ* is subject to some qualification—certain restrictions having been imposed by the legislature with respect to all such animals as fall under the denomination of *game* (*q*).

On this subject, there formerly existed (as every reader is aware) a system of a severe character, under which none were permitted to take or sell game unless duly *qualified*; and the ordinary qualification was the ownership of lands or tenements in possession, for an estate of inheritance of the yearly value of 100*l*.; or for life, or ninety-nine years

Caux v. Eden, Doug. 594; *Elphinstone v. Bedreechund*, Knapp's Rep. 316; *Lord Camden v. Home*, 2 H. Bl. 533; *Dobree v. Napier*, 2 Bing. N. C. 781. There are also the following enactments connected with this subject:—3 & 4 Vict. c. 65, ss. 22, 23; 6 & 7 Vict. c. 38, s. 2; and 27 & 28 Vict. c. 25, "An Act for regulating Naval Prize of War." See also post, bk. v. cc. v., XIII. As to the course of proceedings in

a prize court, see 3 Chit. Commercial Law, 608—618.

(*o*) 2 Bl. Com. 403.

(*p*) Vide sup. p. 5.

(*q*) Other exceptions to the general right of chase are noticed by Blackstone (vol. ii. p. 403); particularly with regard to "certain royal fish, as whale and sturgeon, the taking of which is the exclusive right of the prince."

or upwards, of the yearly value of 150*l.* (*q*). This restraint as to qualification was imposed chiefly for the preservation of the different species of animals, and for the prevention of idleness and dissipation in the lower ranks; and with the same view, and for the benefit of the revenue, it was also made necessary for sportsmen to take out a yearly game *certificate*, attesting the payment of a certain amount of duty. The principle of requiring the possession of any estate as a qualification for the pursuit of game, has now however been abandoned. For the Qualification Act (22 & 23 Car. II. c. 25), and indeed almost all the other statutes relating to game (*r*), were repealed by 1 & 2 Will. IV. c. 32; by which Act it is now provided in substance that the right to kill game upon any land shall be vested *ratione soli* in the owners of such land (mere occupiers of short terms excepted), or in any person who may have their grant or permission for the purpose (*s*). But it is still considered expedient to recruit the public revenue from this source; and the statute of Will. IV. (as amended by 23 & 24 Vict. c. 90) requires, therefore, all persons killing, taking or pursuing game to take out a yearly excise licence—which stands in the place of the former game certificate (*t*); and also requires persons, who (having no such licence) *deal* in game, to take out an excise licence for this latter purpose (*u*). There are also many penal provisions

(*q*) 22 & 23 Car. 2, c. 25. A person might also have been qualified as being the son and heir apparent of an esquire or other person of higher degree, or as the game-keeper of the lord or lady of a manor, or as the owner or keeper of a forest, park, chase or warren.

(*r*) The 9 Geo. 4, c. 69, however, as to *night poaching*, is still in force, and has been extended by 7 & 8 Vict. c. 29. There are also penal provisions with regard to poaching and the illegal pursuit of

or destruction of deer, hares and rabbits, contained in the Larceny Act, 24 & 25 Vict. c. 96.

(*s*) 1 & 2 Will. 4, c. 32, ss. 7—17.

(*t*) Ibid. s. 23; 23 & 24 Vict. c. 90, s. 4. It may be observed, that by 33 & 34 Vict. c. 57, an excise licence of 10*s.* was imposed on every person *using or carrying a gun*. But from this necessity any person, having at the time a valid licence or certificate to kill game, is exempted. (Sect. 7.)

(*u*) 1 & 2 Will. 4, c. 32, s. 25;

intended for the better preservation of game (*x*), and for the protection of land from unlawful trespasses in sporting (*y*). It is to be remarked, that, under these Acts, “game” is defined as including hares, pheasants, partridges, grouse, heath or moor game, black game and bustards (*z*); though some of their provisions are also directed to deer, woodcocks, snipes, quails, landrails, and rabbits (*a*). With regard to *hares*, there are also some special provisions in later Acts,—it being provided by 11 & 12 Vict. c. 29, and 23 & 24 Vict. c. 90, that, in the absence of special agreement otherwise, any occupier of inclosed lands, or any owner thereof with the right of killing game thereon,—may kill any hare on such land, without an excise licence; and that such licence need not be obtained by any person who shall pursue hares with greyhounds, beagles or other hounds (*b*). And not only in the case of hares, but of all game, no licence need be obtained by a person who is merely assisting another in the pursuit of game which he is duly licensed to kill (*c*).

As to the pursuit of animals *feræ naturæ* in the chase (the ordinary means of acquiring them by occupancy), certain distinctions have been laid down (*d*). If a man starts any such animal on his own ground, and follows it into another’s, and kills it there, the property remains in

23 & 24 Vict. c. 90, s. 14. And see 24 & 25 Vict. c. 91, s. 17.

(*x*) 1 & 2 Will. 4, c. 32, ss. 3, 4, 24. See *Saunders v. Baldy*, Law Rep., 1 Q. B. 87. There is also 25 & 26 Vict. c. 114, for the prevention of poaching, under which suspected persons may be searched for game by a constable. (See *Brown*, app. *Turner*, resp. 13 C. B., N. S. 485; *Evans v. Botterill*, 3 B. & Smith, 787; *Hall*, app. *Knox*, resp. 4 B. & Smith, 515.)

(*y*) 1 & 2 Will. 4, c. 32, s. 30, et seq.; see *The Queen v. Pratt*, 4 Ell.

& Bl. 860; *Osbond*, app. *Meadows*, resp. 12 C. B., N. S. 10; *Spicer v. Barnard*, 1 E. & E. 748; *Cornwell v. Sanders*, 3 B. & Smith, 206.

(*z*) 1 & 2 Will. 4, c. 32, s. 2.

(*a*) Sects. 31, 32; 23 & 24 Vict. c. 90, ss. 4, 5. See also 32 & 33 Vict. c. 17, as to the protection of *sea birds*, and 35 & 36 Vict. c. 78, of certain other *wild birds* during the breeding season.

(*b*) 11 & 12 Vict. c. 29, s. 5.

(*c*) 23 & 24 Vict. c. 90, s. 4.

(*d*) See 2 Bl. Com. 419.

himself (*d*); but if (being a trespasser) he starts it on another's land, and kills it there, the property belongs to him in whose ground it was killed (*e*); and this, even though the trespasser hath forthwith sold the dead game to a third person (*f*). Again, if it be started by a stranger in one man's chase or free warren, and hunted into another liberty, the property (it is said) continues in the owner of the chase or warren (*g*). These distinctions seem to show, that in general the property is acquired by the seizure or occupancy, though that cannot prevail against the better claim of him in whose grounds the animal is both killed and started (and who therefore may be said to be entitled *ratione soli*); or of him who has already a qualified property in it, *ratione privilegii*.

3. [The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means,—as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils,—the original owner of the thing was entitled, by his right of possession, to the property of it under such its state of improvement (*h*); but if the thing itself by such operation was changed into a different species,—as by making wine, oil or bread out of another's grapes, olives or wheat,—it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted (*i*). And these doctrines are implicitly copied and adopted by our Bracton (*k*), and have since been confirmed by many

(*d*) See *Keble v. Hickringill*, 11 Mod. 75; *Sutton v. Moody*, Lord Raym. 251; 12 Mod. 145; 2 Salk. 556; 3 Salk. 290; Comb. 458.

(*e*) *Sutton v. Moody*, ubi sup.

(*f*) *Blades v. Higgs*, 11 H. of L. Cas. 621.

(*g*) See *Sutton v. Moody*, ubi sup.; *Churchward v. Studdy*, 14 East, 249.

(*h*) Inst. 2, 1, 25, 26, 31; Ff. 6, 1, 5.

(*i*) Inst. 2, 1.

(*k*) L. 2, c. 2.

[resolutions of the Courts (*l*). With respect to accession by breeding from animals, in particular, it is held, that of all tame and domestic animals the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that *partus sequitur ventrem* in the brute creation, though for the most part, in the human species, it disallows that maxim. And therefore in the laws of England (*m*) as well as Rome (*n*), “*si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est.*” And for this Puffendorf (*o*) gives a sensible reason, not only because the male is frequently unknown, but also because the dam, during the time of her pregnancy, is almost wholly useless to the proprietor, and must be maintained with greater expense and care; wherefore, as the owner is a loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets, which belong equally to the owners of the cock and hen, and shall be divided between them (*p*). But here the reason of the general rule ceases, and *cessante ratione cessat et ipsa lex*; for the male is well known by his constant association with the female: and for the same reason, the owner of the one doth not suffer more disadvantage during the time of pregnancy and nurture, than the owner of the other (*q*).

4. To the same general head belongs also the case of *confusion* of goods: where those of two persons are so intermixed that the several portions can be no longer distinguished; and here the English law partly agrees with and partly differs from the civil. If the intermixture be by consent, it seems that, in both laws, the proprietors have an interest in common, in proportion to their respec-

(*l*) 5 Hen. 7, 15; 12 Hen. 8, 10;
Bro. Ab. Propertie, 23; Moore, 20;
Popham, 38.

(*m*) Bro. Ab. Propertie, 29.

(*n*) Ff. 6, 1, 5.

(*o*) De J. N. & G. 1, 4, c. 7.

(*p*) Case of Swans, 7 Rep. 17.

(*q*) 2 Bl. Com. 390, 391.

[tive shares (*r*). But if one wilfully intermixes his money, corn or hay, with that of another man, without his approbation or knowledge; or casts gold, in like manner, into another's melting-pot or crucible; the civil law, though it gives the sole property of the whole to him who has not interfered with the mixture, yet allows a satisfaction to the other, for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent (*s*).] It is to be observed, however, that this rule applies only to cases where the confusion is such as to create a difficulty in the subsequent apportionment of the respective shares. For if the goods continue to be distinguishable, as in the instance of articles of furniture thrown together, the confusion makes no alteration in the property (*t*). And the case is the same where the quality of the articles is uniform, and the original quantities known; for under such circumstances the party by whose act the confusion took place, would still be entitled (as it seems) to claim his proper quantity (*u*).

(*r*) Inst. 2, 1, 27, 28; 2 Bl. Com. 405. See the observations of the court in *Buckley v. Gross*, 3 B. & Smith, 566.

(*s*) *Ward v. Ayre*, Cro. Jac. 366; 2 Bulst. 323, S. C.; Poph. 38; 1

Hale, P. C. 513; *Colwill v. Reeves*, 2 Camp. 576.

(*t*) *Colwill v. Reeves*, ubi sup.

(*u*) 2 Kent's Com. 298; *Lupton v. White*, 15 Ves. 442.

CHAPTER III.

OF TITLE BY INVENTION.



It was noticed in a former chapter, that there are a sort of chattels that may be termed incorporeal, and that among these are to be included patent rights and copyrights(*a*). To these, as very important in their character, we now propose to refer with greater particularity; and as they both are founded on the same title, viz. that of invention, or the original conception of genius, they may with propriety be considered together, within the compass of the same chapter.

I. By a “patent right” we are to understand a privilege granted by the crown to the first inventor of any new contrivance in the manufactures, that he alone shall be entitled, during a limited period, to benefit by his own invention. It is so called, because the instrument, by which it is bestowed, is always in the form of *letters-patent*, which is the established mode of royal grant(*b*). To confer, indeed, on any individual the exclusive right of carrying on a particular trade or manufacture is, in general, beyond the lawful bounds of the royal prerogative. Such a grant amounted, at common law, to what was termed a monopoly(*c*); and it is declared by the Statute of Monopolies, 21 Jac. I. c. 3, to be “altogether “contrary to the laws of this realm.” But an exception was always made in favour of inventors of new manufac-

(*a*) Vide sup. p. 9.

c. xv.

(*b*) As to royal grants in general,
vide sup. vol. I. p. 618; post, bk. v.

(*c*) 3 Inst. 181; et vide post, bk.
vi. c. xi.

tures, because such grants of exclusive privilege for a reasonable period, while they tended to encourage useful ingenuity, encroached on no right of which others were already in possession (*e*). In accordance with which principle, the same statute proceeds to except from its general declaration against monopolies all letters-patent for the term of *fourteen years* or under, by which the privilege of sole working or making any new manufactures within this realm, which others at the time of granting the letters-patent shall not use, shall be granted to the true and first inventor thereof; “so as they be not contrary to law, nor mischievous to the state, nor to the hurt of trade, nor generally inconvenient.”

Since the passing of this Act, no patent right can be valid unless it range itself within the terms of the exception above referred to; for where not within those terms, it necessarily falls under the general declaration against monopolies therein contained (*f*). It results from this consideration, that no such right can be legally granted for any period longer than fourteen years. It also follows that the subject of a patent must be a “new manufacture within this realm,” for such are the terms of the exception. And, first, it must be a *manufacture*, that is, some article fabricated by the hand of man (*g*); though a patent may be taken out not only for an entire article, but for an addition, by way of improvement, to one already existing (*h*). The manufacture must also be *new*; and the statute has added to that condition, that it must be such as “others “at the time of granting such letters-patent shall not use.” If a patent, therefore, be granted for an article already used, or known or communicated to the public in this

(*e*) 3 Inst. 184.

(*f*) See per Buller, J., *Boulton v. Bull*, 2 H. Bl. 486.

(*g*) See *Hornblower v. Boulton*, 8 T. R. 99; *Boulton v. Bull*, 2 H. Bl. 482; *The King v. Wheeler*, 2 B.

& Ald. 350; *Cornish v. Keene*, 3 Bing. N. C. 570; *Kay v. Marshall*, 5 Bing. N. C. 492.

(*h*) *Hornblower v. Boulton*, ubi sup.; *Crane v. Price*, 4 Man. & G. 580.

country—whether the prior use or discovery be known to the patentee or not—the grant will be void (*i*). But, on the other hand, it is sufficient that it be new *within this realm* at the time the patent is granted; and the previous notoriety of the article, in a foreign country, is no objection to the validity of the patent (*k*). The grant also can be made only to the “true and first inventor;” and here we may observe as to the word *inventor*, that it implies some exertion of ingenuity, and supposes some difficulty surmounted; so that when the new manufacture is of an obvious character, requiring no skill or contrivance for its production, it is not a fit subject for protection under a patent (*l*). As to being the *true and first* inventor, no one can claim this character, if it appear that the novelty in question was first suggested to him by some other person in this country (*m*). Yet where the secret is acquired abroad by one who afterwards introduces it into the realm, he is considered by the law (for the purpose now under consideration) as the true inventor; for it is immaterial whether the benefit bestowed on the public be the result of a man’s travel and observation, or the fruit of his original genius (*n*). In the case of two simultaneous discoverers, he who first procures a patent, before the matter is made public, is entitled to enjoy the exclusive privilege it confers (*o*).

The grant of a patent right is not *ex debito justitiæ*, but an act of royal favour; though in a fit case it is never refused. The mode of proceeding to obtain it, is regu-

(*i*) See 3 Inst. 184; *Morgan v. Seaward*, 2 Mee. & W. 544; *Stead v. Williams*, 7 Man. & G. 818; *Sellers v. Dickinson*, 5 Exch. 312; *Re Adamson’s Patent*, 25 L. J. (Ch.) 457.

(*k*) *Beard v. Egerton*, 3 C. B. 97. By 33 & 34 Vict. c. 27, it is provided, that showing an invention at any international exhibition shall

not, within certain limits of time, prejudice the inventor.

(*l*) *Walker v. Congreve*, *Godson*, 68, (n.), edit. 1832.

(*m*) *Lewis v. Marling*, 10 Barn. & Cres. 22.

(*n*) *Edgeberry v. Stephens*, 2 Salk. 447; *Nickels v. Ross*, 8 C. B. 679.

(*o*) *Godson*, 31, 2nd edit.

lated by certain Acts passed on this subject, the principal of which is the 15 & 16 Vict. c. 83—called “The Patent Law Amendment Act, 1852,”—amended in some of its provisions by the 16 & 17 Vict. c. 5, and c. 115 (*p*). The general course of proceeding indicated by these enactments is as follows:—An application for the patent is made by petition to the crown, the allegations of which are to be supported by a solemn declaration that the petitioner is the true and first inventor, and that the invention is not in use in this country by any other person to the best of his knowledge and belief. This petition and declaration are to be left at the office of “Commissioners of Patents for Inventions,” and with them an instrument called “the provisional specification,” describing the nature of the invention (*q*). The applicant is then referred by the commissioners to one of the law officers of the crown, who is at liberty to call any scientific or other person to his aid; and if the law officer shall be satisfied that the provisional specification describes the nature of the invention, and certifies his allowance of the same, the invention may, during six months from the date of the application, be used and published without prejudice to any letters-patent to be afterwards granted; or the applicant may, if he think fit, file with the petition and declaration a “complete” in lieu of a “provisional” specification, inserting in the declaration an additional statement, that the instrument particularly describes and ascertains the nature of the invention, and in what manner the same is to be performed. And in this case the applicant shall have during the same term of six months the like powers and privileges as might have been conferred upon him by letters-patent on the date of the application, and during the same term the in-

(*p*) There are also 5 & 6 Will. 4, c. 83; 2 & 3 Vict. c. 67, and 7 & 8 Vict. c. 69, some of the enactments of which are still in force.

(*q*) As to the amount of particularity required in the provisional specification, see *In re Newall* and others, 4 C. B., N. S. 269.

vention may be used and published without prejudice to any letters-patent to be granted.

The next step is for the applicant to give notice at the office of the commissioners, of his intention to proceed with his application: which will then be advertised by the commissioners: and any person having an interest in opposing the grant of the letters-patent will be at liberty, within a certain period, to lodge particulars in writing of his objections. The period for objection being expired, the specification and the objections are referred to the law officer, who, after such hearing as he thinks fit, may cause a warrant to be made for the sealing of the letters-patent: which warrant having been sealed by the commissioners, the Lord Chancellor may thereupon cause letters-patent for such invention to be sealed with the great seal of the united kingdom (*r*), granting to the applicant the exclusive right of using the same within the united kingdom, the Channel Islands and the Isle of Man, and (if the warrant so direct) within the colonies, or such of them as shall be specified (*s*), for the full term of fourteen years (*t*). But the letters-patent always contain a proviso to the effect, that, if the “complete specification” already filed does not particularly describe the nature of the invention and in what way the same is to be performed,—or, supposing none to have been yet filed, then, if the applicant does not within a limited period file such a specification in the Court of Chancery,—the grant in the letters-patent contained shall be void (*u*). The object

(*r*) See *Vincent's Patent*, Law Rep., 2 Ch. Ap. 341.

(*s*) As to the time at which letters-patent shall take effect in the colonies, see 26 & 27 Vict. c. 76.

(*t*) By 15 & 16 Vict. c. 83, s. 34, a book, called a “Register of Patents,” is directed to be kept at the specification office for the public use. As to the substitution of stamp duties for fees in procuring

or working patents, see 16 & 17 Vict. c. 5; *Hill v. Mount*, 25 L. J., C. P. 190; *Williams v. Nash*, 28 Beav. 93.

(*u*) By 16 & 17 Vict. c. 115, s. 6, the Lord Chancellor has power, in certain cases, to seal letters-patent after the expiration of the provisional protection; and also power in certain cases to extend the time for filing the specification.

of the specification thus required, as the condition of the letters-patent, is to put the public in full possession of the inventor's secret, so that any person may be in a condition to avail himself of it, when the period of exclusive privilege has expired (*v*). To prevent this object from being defeated by an evasive or careless description, the proviso is construed with great strictness by the courts of law; and it is held to be infringed, and the letters-patent to be consequently void, not only in case of failure to file any such specification at all, but whenever that which is filed is in any part of it materially false or defective. It is a principal rule on this subject, that, in describing the nature of the invention, the specification must correspond with the title of the patent; for its office is to set forth, with more particularity, the subject already indicated in the patent itself; and if one thing be claimed by the patent, and another by the specification, the grant is void (*x*). It is also an objection to the specification, if it should cover too much; that is, include in its claim of new invention any thing which in fact has been already known and practised (*y*); and therefore if the entire article for which the patent has been taken out comprise some matter of this description, in connection with others that are new, the claim should be made in such form as to apply to the latter only; or if the combination of several known things happen to be the only novelty, it is to the combination only that the claim should be pointed (*z*). As to the description of the manner of performance or production, the general rule is, that the specification should enable persons of ordinary skill to make the patent article,

(*v*) As to *indexes* of specifications for the public use, see 15 & 16 Vict. c. 83, and 16 & 17 Vict. c. 5, s. 8. See also 22 Vict. c. 13, enabling the Secretary of State for the War Department to have the specification kept secret, when the patent is for an improvement in an instrument

or munition of war.

(*x*) The King *v.* Wheeler, 2 Barn. & Ald. 345.

(*y*) See Minter *v.* Mower, 6 Ad. & Ell. *per cur.* p. 745.

(*z*) See Holmes *v.* The London and North Western Railway Company, 22 L. J., C. P. 58.

by simply following the directions given, without resorting to contrivances of their own (*a*). In addition to which, we may remark, that no circumstance can be safely passed over in framing the specification which is advantageous, whether absolutely essential or not, in the conduct of the process; and that if several methods are stated, the specification will be defective and the patent void, if *either* of them be found to fail in effecting the promised result (*b*).

A patent right is *assignable* (*c*); and the assignment of it should be in writing under hand and seal (*d*), a circumstance not essential (as we shall see hereafter) in regard to the sale of moveables. It is also competent to the patentee, without any entire alienation of his interest, to grant deeds of *licence*, to any one or more persons, to manufacture the article (*e*).

In favour of a patentee who has not yet reaped the full benefit of his invention, the legislature has frequently interfered, by passing a private act of parliament to secure him the continuance of the privilege for a further term of years, in addition to that first limited by the letters-patent. But a less costly mode of relief in such cases is now pro-

(*a*) See *Hills v. Evans*, 31 L. J., Ch. 457.

(*b*) *Wood v. Zimmer*, Holt, N. P. 58. The cases in the books on the requisites and construction of the specification are numerous. The following may be usefully consulted in addition to those already referred to in the text:—*Harman v. Payne*, 11 East, 101; *Brnuten v. Hawkes*, 4 Barn. & Ald. 541; *Bloxam v. Elsee*, 6 B. & Cr. 169; *Saunders v. Aston*, 3 B. & Ad. 831; *Morgan v. Seaward*, 2 Mee. & W. 544; *Tetley v. Easton*, 2 El. & Bl. 956; *Heath v. Smith*, 3 Ell. & Bl. 256; *Beard v. Egerton*, 3 C. B. 165; *Sellers v. Dickinson*, 5 Exch. 312; *Betts v.*

Menzies, 1 E. & E. 909.

(*c*) As to assignment of *part* of a patent, see *Dunnicliff v. Mallet*, 7 C. B. (N. S.) 209.

(*d*) See *Chanter v. Leese*, 5 Mee. & W. 700; *Power v. Walker*, 3 M. & Sel. 9.

(*e*) As to a *licence* not under seal, see *Chanter v. Dewhurst*, 12 Mee. & W. 823. It may be observed, that all assignments and licences relating to letters-patent must (before they can affect the rights of the original grantees) be *registered* in a book directed to be kept at the specification office, called “The Register of Proprietors.” (15 & 16 Vict. c. 83, s. 35.)

vided. For, by the above-mentioned Acts as to patents, the grantee under such circumstances may apply *by petition* to the crown for a prolongation of the existing term—his intention to do so being first duly advertised (*f*), and the petition being actually presented, six calendar months at least, before the expiration of the term;—and, if upon consideration of the whole matter, and after hearing any party who may choose to enter a “caveat,” the judicial committee of the privy council shall report in favour of the application (*g*), the crown is empowered to grant to such patentee—or to his assigns, or to both conjointly, as the case may be (*h*),—new letters-patent for any term not exceeding fourteen years, to commence after the expiration of the first patent (*i*).

If a patent right be infringed (*k*), the inventor has his remedy by action, to recover damages for the injuries sustained (*l*); and he may in such action (or by application without action) obtain an order restraining the wrongdoer from the further use of the invention, and compelling him to account for the profits which he may have already derived therefrom (*m*). In addition to which, it is provided by 5 & 6 Will. IV. c. 83, s. 7, that if any person shall, without licence, use the

(*f*) See *Re Derome's Patent*, 4 Moore's P. C. C. 461; *Herbert's Patent*, Law Rep., 1 P. C. 399; *Allan's Patent*, ib. 507.

(*g*) See 36 & 37 Vict. c. 66, s. 21.

(*h*) 7 & 8 Vict. c. 69, s. 4; and see *Ledsam v. Russell*, 1 H. of L. Cas. 687; *Trotman's Patent*, Law Rep., 1 P. C. 118.

(*i*) As to the conditions of such prolongation, see *Mallet's Patent*, Law Rep., 1 P. C. 308.

(*k*) As to what shall amount to infringement, see *Minter v. Williams*, 4 Ad. & El. 251; *Stead v. Anderson*, 4 C. B. 806; *Smith v.*

London and North Western Railway Company, 2 Ell. & Bl. 69.

(*l*) By 15 & 16 Vict. c. 83, s. 41, the inventor must deliver with his statement of complaint particulars of the breaches of which he complains. As to which see *Talbot v. La Roche*, 15 C. B. 310; *Jones v. Lee*, 25 L. J., Exch. 241.

(*m*) See sect. 42; 17 & 18 Vict. c. 125, ss. 79–82; *Gittens v. Symes*, 15 C. B. 362; *Hill v. Thompson*, 3 Mer. 622; *Crossley v. Beverley*, 1 Russ. & Mylne, 166; *Bridson v. M'Alpine*, 8 Beav. 229.

name, stamp or mark of any patentee, he shall for every such offence forfeit the sum of 50*l*. A proceeding for infringement may however be successfully resisted, either on the ground that none has in fact taken place, or that the patent is invalid (*o*); and such invalidity may be established by showing that the article was not a fit subject for a patent, or else that the patentee was not the first inventor, or that the specification was insufficient. Nor is this the only method of defeating claims founded on an illegal grant of patent right; for whether there be any complaint of infringement or not, it is competent to the crown (or to any subject of the realm in the sovereign's name, by leave of the attorney-general) to institute a proceeding called *scire facias*, for the formal impeachment of the patent; and by the effect of this (if found open to any of the objections above enumerated, or to any other sufficient exception in point of law) the patent will be cancelled (*p*).

For the protection of patentees, the acts of parliament above mentioned have introduced some other provisions of great importance. First, in the case where, after a patent has been granted to a person on the ground of his being the first inventor, it is discovered that some other person had in fact preceded him in the use of his invention, though the article was, at the time of the grant, not generally known to the public, the Acts enable the patentee or his assigns to petition the crown for a new grant, or a confirmation of the existing one (*q*),—and if

(*o*) By 15 & 16 Viet. c. 83, s. 41, a defendant setting up such a defence must at the same time particularize his objections to the patent. As to which, see *Palmer v. Cooper*, 9 Exch. 231; *Honiball v. Bloomer*, 10 Exch. 538.

(*p*) As to the proceedings on writs of *scire facias* issuing out of the Court of Chancery, in the case of patents for inventions, see 12 & 13 Viet. c. 109, s. 29; 15 & 16 Viet.

c. 83; *Smith v. Upton*, 6 Man. & Gr. 251. Et vide post, bk. v. c. xv. By 15 & 16 Viet. c. 83, s. 41, the prosecutor must deliver to the inventor particulars of the objections to the patent on which he means to rely at the trial in support of his suggestions.

(*q*) As to the confirmation of a patent, see *Re Card's Patent*, 12 Jur (P. C.) 507.

the judicial committee of the privy council shall, upon investigation of the case, report in his favour, such relief may be lawfully awarded (*r*). Again, if any error be discovered in the title or specification, the patentee or his assigns (or both conjointly, if part of the patent only has been assigned) are allowed by these statutes to rectify it for the future (though not as regards any pending action or suit for an infringement), by filing in chancery (on first obtaining leave from the proper law officer) a *disclaimer* of any part of the title or specification; or a memorandum of any alteration therein, not operating as an extension of the patent right (*s*).

II. The other species of incorporeal chattels of which we proposed to treat, is *copyright*, that is, the right of an author to print and publish his own original work, exclusively of all other persons (*t*).

The Roman law contains no recognition of the right of property as regards the productions of literature (*u*); though the sale of literary copies, for the purposes of recital or multiplication, is certainly as antient as the times of Terence (*x*), Martial (*y*), and Statius (*z*). Neither with us in England was the right of authors in this respect clearly ascertained until a comparatively late period of our legal history. But in the reign of Queen Anne, it became at length the subject of positive regulation; for by 8 Anne, c. 19, it was enacted, that the author of any book, and his assigns, should have the sole liberty

(*r*) 5 & 6 Will. 4, c. 83, s. 2.

(*s*) As to disclaimers and memoranda of alterations, see Perry *v.* Skinner, 2 Mee. & W. 471; Spilsbury *v.* Clough, 2 Q. B. 467; Stocker *v.* Warner, 1 C. B. 148; 5 & 6 Will. 4, c. 83; 7 & 8 Vict. c. 69; 12 & 13 Vict. c. 109; 15 & 16 Vict. c. 83.

(*t*) As to the right of *foreigners* to acquire copyright in respect of their works published by them while

resident in this country, see Ollendorf *v.* Black, 20 L. J. (Ch.) 165; Jefferys *v.* Boosey, 4 House of Lords Cases, 815; Low *v.* Routledge, Law Rep., 1 Ch. App. 42; Low *v.* Ward, ib. 6 Eq. Ca. 415.

(*u*) 2 Bl. Com. 407.

(*x*) Prol. in Eunuch. 20.

(*y*) Epigr. i. 67; iv. 72; xiii. 3; xiv. 194.

(*z*) Juv. vii. 83.

of printing and reprinting it, “for the term of fourteen years, and no longer.” And his right, to this extent, was by the same statute (amended by 15 Geo. III. c. 53, and 41 Geo. III. c. 197), protected by the imposition of penalties and forfeitures on all those by whom it should be infringed, with a further direction that if, at the end of that term, the author himself should be living, the right should then return to him for another term of the same duration. And all of this appears to have been suggested by the exception in the Statute of Monopolies, 21 Jac. I. c. 3,—which allowed a royal patent of privilege to be granted for fourteen years, to any inventor of a new manufacture (*a*).

The true nature and extent of copyright were not, however, definitely settled by the statute of Queen Anne; for it was left in uncertainty, whether at the common law, and independently of that statute, an author did or did not possess an exclusive privilege (without limitation in point of time) of publishing and republishing his own works; and whether, supposing that he did, the statute had not permitted that privilege to remain without abridgment—the limitation which it contains in point of time being thought by some to apply to the new protection only, and not to the right itself. Nor were these questions set at rest until the year 1774; when it was solemnly decided, that, supposing any exclusive privilege to have belonged to authors at the common law, it was at any rate taken away by the legislative enactments above mentioned: which thenceforth constituted the only basis on which a claim to copyright could rest, and consequently restrained it to the period of limitation by the Acts provided (*b*); the opinion of a majority of the judges being at the same time incidentally declared (in conformity with a prior

(*a*) 2 Bl. Com. 407. Vide sup. 2408; and see acc. *Millar v. Taylor*, 4 Burr. 2303; *Beckford v. Hood*, 7

(*b*) *Donaldson v. Beckett*, in Dom. T. R. 620; *Jefferys v. Boosey*, 4 Proc. 2 Bro. P. C. 145; 4 Burr. House of Lords Cases, 815.

decision), that at common law an author *did* possess the sole right, not only of first publishing, but of afterwards republishing his own works, and that it belonged to him and his assigns in perpetuity (*c*).

Afterwards, in the reign of George the Third, the period of literary proprietorship was extended by Acts, which conferred upon the author an exclusive right for twenty-eight years instead of fourteen, and in the event of his surviving that term, then for the residue of his natural life. This subject, however, is now mainly regulated by the Copyright Act passed in the year 1842, viz., the 5 & 6 Vict. c. 45 (*d*); which provides still more amply in favour of literature, by an enactment that the copyright of every *book*—under which word is included, in the construction of the Act, “every volume, part, or division of “a volume, pamphlet, sheet of letter-press, sheet of music, “map, chart, or plan, separately published in the united “kingdom,” (*e*)—which shall be published in the lifetime of its author (*f*), shall endure for his natural life, and for seven years longer (*g*); or if the seven years shall expire

(*c*) *Donaldson v. Beckett*, 4 Burr. 2408.

(*d*) By this statute 8 Anne, c. 19, 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, were repealed.

(*e*) 5 & 6 Vict. c. 45, s. 2. As to the copyright in articles inserted in *periodical works*, it vests, as the general rule and in the absence of any special agreement, in the author. (See *Bishop of Hereford v. Griffin*, 16 Sim. 199; *Richardson v. Gilbert*, 1 Sim. (N. S.) 336; *Sweet v. Benning*, 16 C. B. 459.) By 5 & 6 Vict. c. 45, s. 2, the word “copyright” is, in the construction of that Act, to mean “the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is ap-

plied.” Hence copyright may be violated even by a gratuitous distribution of the work, if unauthorized. (*Novello v. Sudlow*, 12 C. B. 177.) On the other hand, it has been held no violation of the copyright in a novel to dramatize the story for the stage. (*Reade v. Conquest*, 9 C. B. (N. S.) 755.)

(*f*) The author may be either an *alien friend* or *British-born*. (See *Routledge v. Low*, Law Rep., 3 App. Cas. 100.)

(*g*) The Act contains a provision (sect. 4) as to books published *before* the date of its passing (viz. 1 July, 1842), and in which copyright still subsisted. Such books are entitled to the same extension of the period of copyright; but on

before the end of forty-two years from the first publication, shall endure for such period of forty-two years; and that when the work is posthumous, the copyright shall endure for forty-two years from the first publication, and shall belong to the proprietor of the author's manuscript (*h*). The statute also entitles the proprietor of a copyright infringed by the book being unlawfully printed within the British dominions, to a remedy by action, to be commenced within twelve calendar months (*i*); and as to books unlawfully reprinted in any place out of the British dominions, and imported into the united kingdom, provides, that they may be seized as forfeited, by any officer of the customs or excise, and that the offenders shall be liable to penalties (*j*). It also authorizes, in every case of copyright, the registration by the proprietor of his title, at Stationers' Hall (*k*); and provides, that without previous registration no action

condition, in the case where the copyright had been *purchased*, that an agreement between the author (or his representative) and the purchaser, to accept the benefit of the act, should be made and registered; and in such case, the copyright is the property of such person or persons as shall be expressed in the agreement.

(*h*) The statute also contains an express enactment, that copyright shall be deemed personal property. (5 & 6 Vict. c. 45, s. 25.)

(*i*) By 5 & 6 Vict. c. 45, s. 16, it is provided, that in any action brought within the British dominions against any person for printing any book in which copyright exists, for sale, hire or exportation; or for importing, selling, publishing or exposing for sale or hire, or causing to be imported, sold, published or exposed for sale or hire, any such book,—the defendant pleading thereto shall

give the plaintiff notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be, that the plaintiff was not the author or first publisher, or is not the proprietor, or that some other person was or is so, then the defendant shall specify in such notice the name of such person, together with the title of the book, and the time and place at which such book was first published; or otherwise he shall give no evidence at the trial that the plaintiff was not the author or first publisher, or is not the proprietor.

(*j*) See also 8 & 9 Vict. c. 93, and 10 & 11 Vict. c. 95, giving protection in the British colonies to works entitled to copyright in the united kingdom.

(*k*) 5 & 6 Vict. c. 45, s. 11. And see *Chappell v. Parday*, 12 Mee. & W. 303; *Mathieson v. Harrod*, Law Rep., 7 Eq. Ca. 270.

or other proceeding shall be commenced (*l*), though an omission to register is not otherwise to affect the copyright itself (*m*). The Act contains, moreover, a provision declaring it to be “expedient to provide against the suppression of books of importance to the public;” and that it shall therefore be lawful for the judicial committee of the privy council (*n*), on complaint made to them that the proprietor of a copyright, (after the death of the author,) has refused to republish, or allow the republication of any book, by reason thereof the work is withheld from the public, to grant a licence authorizing the complainant to publish, on such conditions as they may think fit.

The remedy in cases of infringement of copyright is by action to recover damages for an injury already suffered, and also by injunction to restrain the commission of any projected piracy (*o*). We may remark, further, that a copyright is assignable (*p*); and that such assignment is not required, like that of a patent right, to be in every case under the *seal* of the proprietor; it being enacted, by

(*l*) See *Chappell v. Davidson*, 18 C. B. 194. As to works published before 5 & 6 Vict. c. 45, and not registered, see *Murray v. Bogue*, 22 L. J. (Ch.) 457.

(*m*) In certain cases the court may expunge an entry of proprietorship; (5 & 6 Vict. c. 45, s. 14). As to this, see *Ex parte Davidson*, 18 C. B. 297; 2 Ell. & Bl. 577.

(*n*) See 36 & 37 Vict. c. 66, s. 21.

(*o*) See 17 & 18 Vict. c. 125, ss. 79—82; *Southey v. Sherwood*, 2 Meriv. 440; *Barfield v. Nicholson*, 2 Sim. & Stu. 1. As to the rules which prevail with regard to infringement by *copying* matter previously published in another work, see *Murray v. Bogue*, 22 L. J. (Ch.) 457; *Sweet v. Benning*, 16 C. B.

459; *Kelly v. Morris*, Law Rep., 1 Eq. Ca. 697; *Scott v. Stanford*, ib. 3 Eq. Ca. 718; *Morris v. Ashbee*, ib. 7 Eq. Ca. 34; *Pike v. Nicholas*, ib. 5 Ch. App. 251; *Morris v. Wright*, ib. 279.

(*p*) By 5 & 6 Vict. c. 45, s. 3, copyright is expressly given to the author *and his assigns*. As to the assignment of copyright, see *Power v. Walker*, 3 Man. & Sel. 7; *Cumberland v. Planché*, 1 Ad. & El. 580; *Clementi v. Walker*, 2 Barn. & Cress. 866; *D'Almaine v. Boosey*, 1 Y. & C. 288; *Simms v. Marryatt*, 20 L. J. (Q. B.) 454; *Davidson v. Bohn*, 6 C. B. 456; *Leader v. Purday*, 7 C. B. 4; *Ex parte Bastow*, 14 C. B. 631; *Shepherd v. Conquest*, 17 C. B. 427.

5 & 6 Vict. c. 45, s. 13, that an assignment, properly entered in the book of registry at Stationers' Hall, shall be as effectual as if made by deed, and shall be exempt from the payment of any stamp or other duty (*q*).

Though copyright generally exists (as we have seen) in all literary works, this is subject to some exceptions which deserve particular remark. Thus, no privilege of this kind can be claimed in any production which is immoral, blasphemous, or seditious in its tendency, or which is defamatory of private character, or which (with a view to defraud the public) is published as the work of one who is not in truth the author (*r*). For in the eye of the law, the publication of such works is a crime; from which it necessarily follows that there can be no right in the author to publish them, nor any wrong sustained by *him* (whatever may be the injury to the public), if others, without his permission, follow his bad example.

Such being the general law of copyright, it will be proper to take some notice, in this place, of the privileges vested in the crown in regard to particular publications. Thus it is laid down, that the sovereign, as the chief magistrate, has the right of promulgating to the people, all acts of state and government (*s*). As supreme head of the church, too, it is said that the sovereign has the same prerogative with respect to the liturgies, the books of divine service, and the authorized translation of the Bible; though, as regards the last, the right has been considered as depending, in part, upon the circumstance of that translation having been made at the crown's expense (*t*). These

(*q*) As to the former law on this subject, see *Cumberland v. Copeland*, 1 Hurl. & Colt. 194.

(*r*) See *Hime v. Dale*, 2 Camp. 27, n.; *Gee v. Pritchard*, 2 Swanst. 415; *Southey v. Sherwood*, 2 Meriv. 435; *Wright v. Tallis*, 1 C. B. 893.

(*s*) 2 Bl. Com. 410. See *Basket v. Cambridge University*, 2 Burr.

661; 1 W. Bl. 105; *Donaldson v. Beckett*, 4 Burr. 2381; *Millar v. Taylor*, *ibid.* 2408.

(*t*) The sovereign is also said, independently of this prerogative copyright, to have "a right, by purchase, to the copies of such law books, grammars, and other compositions, as were compiled or

privileges are held, moreover, to extend to the crown's grantees; in which capacity the Universities of Oxford and Cambridge, within their respective jurisdictions, and the queen's printer, claim the right of printing the Bible and Book of Common Prayer, and acts of parliament and other acts of state, to the exclusion of all other presses (*u*). These Universities enjoy also, by act of parliament (15 Geo. III. c. 53), the sole liberty of printing for ever, at their own presses, all books of which the copyright has been bequeathed or otherwise given to them, or their respective colleges, in perpetuity; and a similar right belongs to the colleges of Eton, Westminster, and Winchester.

It has been made a question, whether that principle of the common law, which conferred on the author himself the exclusive privilege of publishing and republishing his own compositions, extended to the case of an *oral lecture*; or whether, on the other hand, it was lawful for the hearer to commit the instruction he received to his note-book, or his memory, and to publish it afterwards for his own benefit. The importance of this question, however, is now in some measure superseded by the provisions of a modern statute, 5 & 6 Will. IV. c. 65, under which the sole liberty of printing and publishing any lecture, of the intended delivery of which notice in writing shall have been given to two justices, living within five miles of the place of delivery, two days before it is delivered, is secured to the lecturer (*x*). Other kinds of literary composition, not being books, are now also protected from piracy; and, in particular with regard to *dramatic pieces* (*y*) and *musical*

"translated at the expense of the
"crown."—2 Bl. Com. 410; and see
4 Burr. 2329.

(*u*) Godson, 454, 2nd ed.; Basket
v. Cambridge University, 2 Burr.
661.

(*x*) It is, however, provided that
the law shall remain as if the Act

had not passed, as to lectures de-
livered in a university or public
school or college, or on any public
foundation, or by any individual
in virtue of any gift, endowment
or foundation. (5 & 6 Will. 4,
c. 65, s. 5.)

(*y*) See *Lee v. Simpson*, 3 C. B.

performances (*z*), it has been provided by 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45, ss. 20, 21, that the author of such productions shall have, as his own property, the sole liberty of bringing them out upon the stage.

We may remark, moreover, that the law recognizes a species of copyright, not only in literary works, but in some other productions of genius. For by 8 Geo. II. c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57 (*a*), an exclusive privilege of the same general description may be claimed in respect of *engravings and prints*;—by “The Sculpture Copyright Acts” (*b*), in *sculptures, models, copies and casts*;—by “The Designs Acts,” 1842, 1843, 1850, “The Protection of Inventions Act, 1851,” and “The Copyright of Designs Act, 1858” (*c*) in *designs for articles whether of ornament or utility* (*d*);—and by 25 & 26 Vict. c. 68, in *paintings, drawings, and photographs* (*e*).

Protection also, under certain conditions, is afforded to literary and other productions, though first published in a foreign country. And this subject of *international* copyright is now regulated by 7 & 8 Vict. c. 12, 15 & 16 Vict. c. 12, and 25 & 26 Vict. c. 68, whereby, among other regulations, it is provided, that by order in council her majesty may, as respects such *books, prints, articles of sculpture, paintings, drawings, photographs and other works of art*, as shall be, after a future time to be

871; *Morton v. Copeland*, 16 C. B.

517; *Russell v. Smith*, 12 Q. B. 217;

Hatton v. Kean, 7 C. B. (N. S.) 268.

(*z*) See *Planché v. Braham*, 4 Bing. N. C. 17; *Fitzball v. Brooke*, 6 Q. B. 873; *Planché v. Hooper*, *ibid.* 877, n.; *Ex parte Davidson*, 2 Ell. & Bl. 577.

(*a*) See as to 8 Geo. 2, c. 13, *Avanzo v. Mudie*, 10 Exch. 203; and as to 17 Geo. 3, c. 57, *Moore v. Clarke*, 9 Mee. & W. 692; *Gambart v. Sumner*, 5 H. & N. 5.

(*b*) 38 Geo. 3, c. 71; 54 Geo. 3,

c. 56.

(*c*) See 5 & 6 Vict. c. 100 (amended by 24 & 25 Vict. c. 73); 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 14 & 15 Vict. c. 8; 15 & 16 Vict. c. 6; 21 & 22 Vict. c. 70; 25 & 26 Vict. c. 12.

(*d*) See *Heywood v. Potter*, 1 Ell. & Bl. 439; *Margetson v. Wright*, 2 De Gex & Sm. 420.

(*e*) As to piracy by means of *photography*, see *Graves v. Ashford*, Law Rep., 2 C. P. 410; *Ex parte Beal*, *ib.* 3 Q. B. 387.

specified in such order, first published in any foreign country to be named in such order,—allow the respective authors, inventors, artists, designers, engravers or makers, and their personal representatives, privilege of copyright therein for any period not exceeding the term to which like productions would be protected if first published in the united kingdom (*f*); and may, as respects *dramatic pieces and musical compositions*, which shall be, after a future time specified in such order, first publicly represented or performed in any foreign country named in such order,—allow the authors to have the sole liberty of representing and performing them within the British dominions during any period, not exceeding the time during which they would be entitled by law to such sole liberty, if the first representation or performance had been in the united kingdom (*g*). And also that, by order in council, her majesty may, as regards *translations* of books first published,—or of dramatic pieces first publicly represented,—in any foreign country, direct that the authors of such books or dramatic pieces shall be empowered to prevent the publication in the British dominions of any translation of such books, or the representation of any translations of such dramatic pieces not authorized by them, for such time as shall be specified in her majesty's order, not extending beyond five years from the time at which authorized translations shall be first published or represented respectively. Provision is, however, made that no such order shall have effect, unless, on the face of it, it be grounded on a due reciprocal protection secured by the foreign power therein named, for the benefit of parties interested in works first published in the dominions of her majesty; nor unless, within a limited time, the work sought to be protected be duly registered, and a copy

(*f*) By 24 & 25 Vict. c. 20, books, prints, and drawings, admitted under treaties of inter-

national copyright, are now free of duty.

(*g*) See *Wood v. Boosey*, Law Rep., 2 Q. B. 340.

thereof—if it be a book, a print (*h*), or a printed dramatic piece, or musical composition,—deposited at Stationers' Hall; nor (in the case of translations) unless the original work be registered, and a copy deposited in the united kingdom, in the manner required for original works as above mentioned; nor unless the author notifies on the title page his intention to reserve the right of translation; nor unless a translation, sanctioned by the author, be published within certain limited periods; nor unless such translation be registered, and a copy thereof deposited, as in the case of original works (*i*).

(*h*) If it be a *print* first published in a foreign country it must also (by 8 Geo. 2, c. 13) have the name of the proprietor on each copy as well as on the plate. (See *Avanzo*

v. Mudie, 10 Exch. 203.)

(*i*) As to what is meant by the term “translation” in this enactment, see *Wood v. Chart*, Law Rep., 10 Eq. Ca. 193.

CHAPTER IV.

OF TITLE BY GIFT AND BY ASSIGNMENT.



Our attention will next be directed to the acquisition of chattels personal, by voluntary transfer from the owner thereof; which corresponds with alienation or conveyance, in that branch of the law which relates to the title to real estate (*a*).

The property in things personal is transferable with absolute freedom, to the extent of the proprietor's interest (*b*); and if they are assigned by one man to another, subject to a prohibition to dispose of them, the prohibition is void, both as being repugnant to the gift itself, and as being against the policy of the law (*c*). There are some cases, however, where the right of disposal is, in respect of the incapacity of the owner, suspended; as to which it will be sufficient to remark, that the law laid down in a former place with respect to the disability of infants, insane persons, and persons under duress, applies in general to personal as well as real property (*d*). A married woman, too, is in general under an incapacity to make any transfer of things personal; for, with the exception of her interest in property settled for her separate use, the goods and chattels which she may have possessed at the time of marriage, or may have subsequently acquired, belong to

(*a*) Vide sup. vol. I. p. 467.

(*b*) As to the case of the property being, at the time of transfer, *in futuro*, see Bac. Max. Reg. 14; Lunn v. Thornton, 1 C. B. 379; Baker v. Gray, 17 C. B. 475.

(*c*) See Co. Litt. 223 a; Brandon

v. Robinson, 18 Ves. 429; Woodmeston v. Walker, 2 Russ. & Mylne, 197; Brown v. Pocock, *ibid.* 210; 2 Mylne & Keen, 189; Massey v. Parker, *ibid.* 174.

(*d*) Vide sup. vol. I. p. 474.

her husband (*e*). There are also some few cases, where, in respect of the nature of the interest itself, its transfer is absolutely prohibited. Thus, generally, the pay or half-pay of a military or naval officer, or the salary of any public officer of trust, is, on a principle of public policy, not assignable; the object of the rule being to secure to such persons, even against their own improvidence, the possession of those means which are essential to the maintenance of their station, and the due performance of its duties (*f*). Again, the sale of public appointments themselves is contrary to the policy of the law (*g*), and is prohibited in most cases by the express enactment of the legislature (*h*). But besides these exceptions, we must notice another of a different and more general kind, relative to *choses in action*, or rights not yet reduced into possession (*i*). It is one indeed of a nominal rather than a sub-

(*e*) By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), her wages and earnings, acquired or gained in any employment, occupation or trade carried on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic or scientific skill, and all investments of such property, shall be deemed to be property *held and settled to her separate use*, and with respect to such property her assignments are valid, notwithstanding her coverture.

(*f*) See *Flarty v. Odum*, 3 T. R. 681; *Lidderdale v. Duke of Montrose*, 4 T. R. 248; *Barwick v. Read*, 1 H. Bl. 627; *Aston v. Gwinnell*, 3 Y. & J. 148; *Wells v. Foster*, 8 Mee. & W. 149. However, if an officer (either in the army, navy or civil

service, or in the receipt of a pension) shall become bankrupt, the Court of Bankruptcy may receive, for distribution among his creditors, such portion of his pay, salary or pension as may be just and reasonable, with the sanction of the chief of the department to which such officer belongs. (32 & 33 Vict. c. 79, s. 89.)

(*g*) 2 Sand. Us. 38; see *Ex parte Butler*, 1 Atk. 210.

(*h*) 5 & 6 Edw. 6, c. 16; 49 Geo. 3, c. 126; 6 Geo. 4, cc. 82, 83. See also 3 & 4 Vict. c. 113, s. 42, and 9 & 10 Vict. c. 88, making void, in general, any sale or assignment by a spiritual person of any patronage belonging to him in virtue of his office.

(*i*) *Termes de la Ley*, tit. Chose in Action.

stantial character, but it has led, nevertheless, to important consequences in our legal system.

By the strict rule, then, of the antient common law, no *chose in action* could be assigned or granted over, because it was thought that if a man were allowed to make over to a stranger his right of going to law, it would be a great encouragement to litigiousness (*i*). But this nicety has long been practically disregarded under cover of an assignment in the nature of a declaration of trust, with an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession (*k*). And it has therefore been the practice to sue in the original creditor's name, on a debt or bond assigned over. But the crown has been an exception to the doctrine, having always been held entitled to grant or receive a *chose in action* by assignment (*l*). And now it has been enacted by the Judicature Act, 1873 (in accordance with the rules heretofore observed by the courts of equity on this subject), that any absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be deemed effectual in law to pass the legal right to such debt or *chose in action* (*m*).

The modes of acquiring property in things personal by voluntary transfer *inter vivos*, are two:—first, by

(*i*) 2 Bl. Com. 442.

(*k*) Ibid.

(*l*) Breverton's case, Dyer, 30 b.

(*m*) 36 & 37 Vict. c. 66, s. 25, subs. (6). This Act commences on the 2nd November, 1874. See also

with regard to assignees of *policies*, 30 & 31 Vict. c. 144; 31 & 32 Vict. c. 86; and as to the assignee of a *chose in action* under the Bankruptcy Act (1869), 32 & 33 Vict. c. 71, s. 111.

gratuitous donation, usually called a *gift*; and, secondly, by transfer not gratuitous but founded on some valuable consideration, the proper legal designation of which is an *assignment* (*n*).

1. A gift (being, in its nature, purely gratuitous) is open—particularly when made in favour of a stranger, and not a relative—to some degree of suspicion (*o*); and, as against the creditors of the grantor at the time of the donation, is made void by 13 Eliz. c. 5, of which we had occasion to speak (in reference to the transfer of land) in a former volume (*p*). And by 3 Hen. VII. c. 4, all deeds of gifts of goods, made in trust *to the use of the donor*, were made void, because otherwise persons might be tempted to commit treason or felony, by escaping the consequence which ordinarily resulted from these crimes, viz. the forfeiture of goods (*q*); and also because the creditors of the donor might otherwise be defrauded of their rights.

As against the donor himself, a gift, to be valid and binding, must either be accompanied by the solemnity of a deed, or by that of delivery of possession (*r*). But when so perfected, it is not in his power to retract it, though made without any consideration or recompense,—unless, indeed, the donor was under any legal incapacity, (as infancy, duress, or the like,) or was drawn in, circumvented, or imposed upon by false pretences, inebriety, or surprise.

(*n*) An assignment of personal property is sometimes called a *bargain and sale*, but the latter term is strictly appropriate only to the case where the property passes under a *contract of sale*; as to which, vide post, p. 68.

(*o*) 2 Bl. Com. 144.

(*p*) Vide sup. vol. I. p. 498. See also *Gale v. Williamson*, 8 Mee. & W. 405; and 12 & 13 Vict. c. 106, s. 126.

(*q*) 2 Bl. Com. 441. Et vide post,

bk. VI. c. XXIII.

(*r*) See *Jenk. Cent.* 109; *Irons v. Smallpiece*, 2 B. & Ald. 552; *Martindale v. Booth*, 3 B. & Adol. 506; *Reeves v. Capper*, 5 Bing. N. C. 139; 2 Sand. 47 a, (*n*.); *Shower v. Pilek*, 4 Exch. 478. It may be remarked that a *written memorandum* duly attested will, in a court of equity, be treated as a declaration of trust though the gift has not been delivered. (*Morgan v. Malleon*, Law Rep., 10 Eq. Ca. 475.)

There is a particular species of gift, which, though conferred *inter vivos*, does not take effect till after the death of the donor; and which is consequently in the nature of a legacy, and of no avail against creditors in case of a deficiency of assets (*s*). [It is called a *donatio mortis causâ*; and is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, to keep in case of his decease (*t*). This gift, if the donor dies, needs not the assent of his executor; yet it shall not prevail against creditors, and is, moreover, accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself,—being given only in contemplation of death or *mortis causâ* (*u*).] And, being in the nature of a legacy, this donation may be made by a husband to his wife, though an ordinary gift cannot take place directly between them in his lifetime (*x*). But, to render a *donatio mortis causâ* in any case effectual, it must be accompanied by a delivery of the chattel (*y*); or, of the instrument—such as a bond or note, and the like—by which it is secured; the executor or administrator of the donor being bound to put such instrument in suit, for the benefit of the donee (*z*). Upon such delivery, too, the possession must be permanently retained by the donee;

(*s*) Ward *v.* Turner, 2 Ves. sen. 434. It is accordingly subject to legacy duty by 36 Geo. 3, c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4.

(*t*) See Tate *v.* Hilbert, 2 Ves. jun. 119; Walter *v.* Hodge, 2 Swanst. 99.

(*u*) See 2 Bl. Com. 514; Snellgrove *v.* Baily, 3 Atk. 214; Lawson *v.* Lawson, 1 P. Wms. 440; Drury *v.* Smith, *ibid.* 404; Miller *v.* Miller, 3 P. Wms. 358; Ward *v.* Turner, 2 Ves. sen. 431; Tate *v.* Hilbert, 2 Ves. jun. 111; Blount *v.* Barrow, 4 Bro. C. C. 72; Hills *v.* Hills, 8 Mee. & W. 401.

(*x*) Miller *v.* Miller, Lawson *v.* Lawson, *ubi sup.*

(*y*) See Bunn *v.* Markham, 7 Taunt. 224; Ruddell *v.* Dobree, 10 Sim. 244; Farquharson *v.* Cave, 2 Coll. 356.

(*z*) See Duffield *v.* Hicks, 1 Bli. N. S. 497; Gardner *v.* Parker, 3 Madd. 184; Witt *v.* Amis, 1 B. & S. 109. A cheque not presented prior to the death of the donor has been held an ineffectual donation. (Hewitt *v.* Kaye, Law Rep., 6 Eq. Ca. 198.)

for if it be resumed by the donor, the gift is void (*a*). This mode of gift is said to have been handed to us from the civil lawyers, who themselves borrowed it from the Greeks (*b*).

2. An assignment of chattels personal may in general be made by parol, that is, either by mere writing, or by mere word of mouth (*c*); and does not require the solemnity of a deed, nor the delivery of possession (*d*). And if made in writing, it may be either in the form of a mere note or memorandum, or by way of regular assignment; which last is ordinarily denominated (whether the transaction be between buyer and seller or not) a *bill of sale*. But in the case of goods sent from abroad by ship to a person resident in this country, the transfer of the property therein is commonly authenticated, or (as the case may be) originally effected, by a *bill of lading*; which is in its form a receipt from the captain to the shipper (usually termed the *consignor*), undertaking to deliver the goods (on payment of freight) to some person whose name is therein expressed, or indorsed thereon by the consignor (*e*). And the delivery of this instrument (independently of the actual delivery of the goods) will suffice to pass and transfer to the party so named (usually termed the *consignee*), or to any other person whose name he may think fit to indorse thereon, the property in such goods (*f*). Moreover, by 18 & 19 Vict. c. 111, it is now

(*a*) Bunn v. Markham, 7 Taunt. 224.

(*b*) 2 Bl. Com. 514, where are cited Inst. 2, 7, 1; Ff. l. 39, t. 6; and it is remarked, "that there is a "very complete *donatio mortis causâ* in the Odyssey, b. 17, v. 78, "made by Telemachus to his friend "Piræus; and another by Hercules, "in the Alcestes of Euripides, v. "1020."

(*c*) Perk. s. 57. See Power v.

Walker, 3 M. & S. 7; Howell v. M'ivers, 4 T. R. 690; Heath v. Hall, 4 Taunt. 326.

(*d*) Shep. Touch. 224; Martindale v. Booth, 3 B. & Adol. 507; Com. Dig. Biens, D. 3.

(*e*) In a bill of lading, "perils of the sea" are usually excepted from the undertaking; Kay v. Wheeler, Law Rep., 2 C. P. 302.

(*f*) See Lickbarrow v. Mason, 2 T. R. 63; 1 H. Bl. 357; 6 East, 21;

expressly provided, that every consignee or indorsee to whom the property shall pass by reason of such consignment or indorsement, shall also (by reason thereof) have transferred to him all rights of suit and be subject to the same liabilities in respect of the goods, as if the contract in the bill of lading had been made with himself(*g*).

Though generally, and by the common law, personal property may be transferred without the use of writing, there are cases where the statute law has made the rule otherwise. For we shall see in the following chapter, that in certain cases, a writing is by statute made essential to a contract for the sale of goods to the value of 10*l.* and upwards(*h*). And by force of several other enactments of the legislature, the solemnity of a writing is also required in the transfer of ships(*i*), and in the assignment of a patent or of a copyright(*k*). To which we may add, that a bill of exchange or promissory note, when made payable to the *order* of a particular person, can be assigned by him only under a written indorsement of his name.

Again, though the property in a chattel personal will pass without *delivery of possession*—yet, it is to be remembered that by the statute of 13 Eliz. c. 5, every grant or gift of chattels (as well as lands), made with an intent to defraud creditors or others, is void as against the persons to whom such fraud would be prejudicial,—though good and effectual as against the grantor himself(*l*). And one of the principal badges of fraud, under this statute, has always been deemed to be the retention of the goods, by

Thompson *v.* Dominy, 14 Mee. & W. 403; Meredith *v.* Meigh, 2 Ell. & Bl. 364.

(*g*) See Smurthwaite *v.* Wilkins, 11 C. B. (N. S.) 842; Meyer *v.* Dresser, 16 C. B. (N. S.) 646; Short *v.* Simpson, Law Rep., 1 C. P. 248; Dracachi *v.* The Anglo-Egyptian Navigation Company, ib. 3 C. P. 190; Jessel *v.* Bath, Law

Rep., 2 Exch. 267.

(*h*) 20 Car. 2, c. 5, s. 17; 9 Geo. 4, c. 14, s. 7. See Harman *v.* Reeve, 18 C. B. 595, post, p. 70.

(*i*) 17 & 18 Vict. c. 104, s. 55, c. 120, sched. (repealing a former Act of 8 & 9 Vict. c. 89); 18 & 19 Vict. c. 91, s. 11.

(*k*) Vide sup. pp. 31, 38.

(*l*) See 3 Rep. 82.

the original owner, if contrary to the purport of his donation or assignment(*m*). Where possession, therefore, is so retained, it is *primâ facie* a case of fraud, entitling the creditors of the original owner to impeach the transaction; but supposing it to be consistent with the apparent object of the parties that possession should for the present be retained, as where the gift or grant is future or contingent only, the transaction is clear, on this head, from any fraudulent complexion(*n*).

Under this head of fraudulent dispositions of property, or those deemed by the law to be of that character, we may take occasion also to notice the antient rule, that where judgment was obtained in a court of law for a debt or damages, and a writ of execution issued against the defendant, the property in his goods was in all cases bound for satisfaction of the execution creditor from the teste or issuing the writ; and that any subsequent sale by the defendant was fraudulent(*o*). Such is even now the law as between the *parties*; and therefore, if a defendant dies after awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors(*p*). But by the Statute of Frauds, (29 Car. II. c. 3, s. 16,) it was provided, in favour of *purchasers*(*q*), that no writ of execution shall, as against them, bind the property in the goods of the defendant but from the time that such writ shall be delivered to be executed: and also in favour of purchasers, another important alteration was made by 19 & 20 Vict. c. 97(*r*); which provides (sect. 1), that

(*m*) *Twyne's case*, 3 Rep. 81; *Shep. Touch.* 66; *Read v. Blades*, 5 Taunt. 212.

(*n*) See 1 Powell, *Mortg. by Cov.* 37; *Edwards v. Harben*, 2 T. R. 587; *Martindale v. Booth*, 3 B. & Ad. 498; *Minshall v. Lloyd*, 2 Mee. & W. 450; *Reeves v. Capper*, 5 Bing. N. C. 136, 138.

(*o*) *Farrer v. Brookes*, 1 Mod.

188; 8 Rep. 171; 2 Bl. Com. 447.

(*p*) *Comb.* 33; 12 Mod. 5; 7 Mod. 95; *Samuel v. Duke*, 6 Dowl. P. C. 536.

(*q*) 2 Bl. Com. ubi sup.

(*r*) As to this Act (called the Mercantile Law Amendment Act, 1856), see *Williams v. Smith*, 4 H. & N. 559.

no writ of execution or attachment against the goods of a debtor shall prejudice the title thereto acquired *bonâ fide*, and for a valuable consideration, before the actual seizure or attachment,—provided the purchaser had not at the time, notice that a writ, by virtue of which the goods might be seized or attached, remained unexecuted in the hands of the sheriff. But on the other hand, there is also an enactment having in view the protection of *creditors*, from sales of a secret and fraudulent character. For by 17 & 18 Vict. c. 36 (called “The Bills of Sale Act, 1854,” and amended by 29 & 30 Vict. c. 96), a bill of sale of personal chattels made at any time by the defendant in an action, will now be void as against the plaintiff on whose behalf a writ of execution in such action shall be sued out and delivered, so far as regards any personal chattels which shall be in the defendant’s possession or apparent possession at or after the time of executing the writ, unless such bill of sale shall have been duly *registered* for public inspection in the Court of Queen’s Bench within *twenty-one days* from its date(*s*); and unless such registration shall be renewed once in every period of *five* years during the subsistence of the security(*t*).

We may conclude with the remark, that in what has been hitherto said of transferring chattels, we have supposed the property to be first vested in the person who assumes to change the dominion; and by the general rule, this circumstance is essential to the validity of the transaction(*u*). There are cases, however, in which a man

(*s*) The operation of this Act is not however confined to bills of sale made by *defendants*; but extends, also, so as to make *any* bill of sale void in bankruptcy, unless duly registered. As to this statute, see *Tuton v. Sanoner*, 3 H. & N. 280; *Hatton v. Williams*, 7 Ell. & Bl. 74; *Grindall v. Brendon*, 6 C. B. (N. S.) 698; *Ex parte Hooman*, Law Rep.,

10 Eq. Ca. 63. It may be remarked, that before the copy of a bill of sale can be filed in any court, the original must be produced to the officer duly stamped. (See 33 & 34 Vict. c. 97, s. 57.)

(*t*) 29 & 30 Vict. c. 96, s. 4.

(*u*) *Peer v. Humphry*, 2 Ad. & El. 495; *Lunn v. Thornton*, 1 C. B. 379.

may confer property in chattels, of which he is not himself the owner, and of which he is not even authorized to make disposition. For if current coin of the realm be paid over for valuable consideration to an innocent party, his title thereto will be complete, although it should have been wrongfully obtained by the party who made the payment(*x*). And the case is the same with respect to notes of the Bank of England, and to the transfer, in regular course, of bills of exchange, promissory notes and of such other negotiable instruments as are transferable by mere delivery(*y*); and also with respect to goods sold in open market, or (as it is expressed in the language of the law) *market overt*(*z*). But on these subjects more ample information will be afforded in the course of the following chapter.

(*x*) *Millar v. Race*, 1 Burr. 452. It is said in the books that “money cannot be followed, because it has “no *earmark*.” But see as to this, 1 Smith’s Leading Cases, 256.

(*y*) See *Grant v. Vaughan*, 3 Burr. 1516; *Clarke v. Shee*, Cowp. 197; *Wookey v. Pole*, 4 Barn. &

Ald. 1; *Gorgier v. Mieville*, 3 B. & C. 45; *Lang v. Smyth*, 7 Bing. 284; *Brandão v. Barnett*, 1 Man. & Gran. 908; *Raphael v. Bank of England*, 17 C. B. 161.

(*z*) *Peer v. Humphry*, 2 Ad. & El. 495.

CHAPTER V.

OF TITLE BY CONTRACT.



WE have next to address ourselves to the subject of *contract*; which may with convenience be considered as one of the species of title to things personal,—it being one of the principal modes in which that important kind of chattel, called a *chose in action*, is originally created (*a*). In contracts, however, there is so infinite a variety, and the relations and combinations to which they give rise are so complicated, as to make it impossible, in an elementary work, to exhibit them in an extended view. Our object will be only to glance at some of the more prominent doctrines which they involve; and, after this, to enlarge a little upon some particular species of contract, which, from their greater frequency or importance, appear most to merit our attention.

To obtain, then, a correct idea of a *contract*, it is necessary first to consider the nature of a *promise*; which is where one man voluntarily engages himself to another for the performance or non-performance of some particular thing. For a *contract* (or *agreement*) is either where a promise is made on one side, and assented to on the other (*b*); or where two or more persons enter into engagement with each other, by a promise on either side. Such promise may be by *parol*, i. e., without deed or other specialty; or it may be by specialty, in which case it is more properly termed a *covenant*. And where a contract

(*a*) Vide sup. p. 45.

(*b*) Plowd. 17; Jackson v. Galloway, 5 Bing. N. C. 75, 76.

is not by specialty, it is called a *parol* (or *simple*) contract, to distinguish it from a contract by specialty.

It results from these definitions that there is in strictness a distinction between a promise and a contract; for the latter involves the idea of mutuality, which the former does not (*c*).

[A promise or simple contract (using the terms indiscriminately, as it is common to do) may be either *written* or *verbal* (*d*). But there are some engagements which, though never so expressly made, are deemed of so important a nature, that they ought not to rest on verbal promise only; which cannot be proved but by the memory (which will sometimes induce the perjury) of witnesses. To prevent which, the Statute of Frauds and Perjuries, 29 Car. II. c. 3 (*e*), enacts (sect. 4), that in the five following cases no verbal promise shall be sufficient to ground an action upon (*f*); but at the least some note or memorandum of the agreement shall be made in writing, and signed by the party to be charged therewith (*g*), or by some

(*c*) Blackstone (vol. ii. p. 446) defines a contract as “an agreement to upon sufficient consideration to do “or not to do a particular thing.” But independently of the objection that the word *agreement* is of a nature to require definition, as much as *contract*, it is conceived that the existence of a consideration, though no doubt essential to the validity of a parol contract, forms properly no part of the idea. When we speak, as we constantly do, of a promise or contract without consideration, the form of expression indicates the propriety and convenience of considering the promise or contract itself, as something distinct from the consideration.

(*d*) *Rann v. Hughes*, 7 T. R. 350.

(*e*) This statute is said to have

been the joint production of Sir M. Hale, Lord Keeper Guildford, and Sir Leoline Jenkins. (Smith on Contracts, p. 32.)

(*f*) It may be remarked here that an action cannot be maintained in an English court, on an agreement entered into in a *foreign country*, and not made conformably to the Statute of Frauds. (*Leroux v. Brown*, 12 C. B. 801.)

(*g*) Though it is only necessary that the *party to be charged* should sign, it is essential that the instrument sought to be enforced should contain all the essentials of an agreement *inter partes*. (See *Williams v. Lake*, 2 Ell. & Ell. 349; *Caton v. Caton*, Law Rep., 2 App. Cas. 127.) On the other hand, a verbal acceptance by the plaintiff

[other person thereunto by him lawfully authorized(*h*). 1. Where an executor or administrator promises to answer damages out of his own estate(*i*). 2. Where a man undertakes to answer for the debt, default or miscarriage of another. 3. Where any agreement is made upon consideration of marriage(*k*). 4. Where any contract or sale is made of lands, tenements or hereditaments, or any interest in or concerning them(*l*). 5. And, lastly, where there is any agreement that is not to be performed within a year from the making thereof(*m*). In all these cases a mere verbal promise is void(*n*).] And upon the same principle, it was afterwards further provided by the 9 Geo. IV. c. 14, (usually called Lord Tenterden's Act,) ss. 1, 8, that no acknowledgment or promise without writing signed by the party chargeable(*o*), shall suffice to revive a debt which would be otherwise barred by lapse of time, or to confirm one contracted during infancy(*p*).

of a proposal in writing by the defendant has been held sufficient. (*Reuss v. Picksley*, Law Rep., 1 Exch. 342.)

(*h*) The authority to sign need not be in writing (see *Chitty on Contracts*, p. 195, 5th ed.)

(*i*) 1 Saund. by Wms. 210, n. (1); *Rann v. Hughes*, 7 T. R. 350.

(*k*) See *Harrison v. Cage*, 1 Ld. Raym. 386; *Cork v. Baker*, 1 Str. 34. As to what agreements are *in consideration* of marriage, see *Smith on Contracts*, p. 57.

(*l*) See *Sainsbury v. Matthews*, 4 Mee. & W. 343; *Warwick v. Bruce*, 2 M. & S. 205; *Humble v. Mitchell*, 11 Ad. & El. 205; *Watson v. Spratley*, 10 Exch. 222; *Smart v. Harding*, 15 C. B. 652; *Toppin v. Lomas*, 16 C. B. 145; *Powell v. Jessop*, 18 C. B. 336; *Hodgson v. Johnson*, 1 E. & E. 685; *Wright v. Stavert*, 2 Ell. & Ell. 721. It may

be remarked, that by a previous section (s. 2), a *lease* may be without writing, provided it be for a term not exceeding three years, and the rent reserved be at the least two thirds of the full improved value of the thing demised.

(*m*) See *Boydell v. Drummond*, 11 East, 142; *Birch v. Lord Liverpool*, 9 Barn. & Cress. 392; *Sykes v. Dixon*, 9 Ad. & El. 693; *Hubert v. Treherne*, 3 Man. & G. 743; *Souch v. Strawbridge*, 2 C. B. 808; *Giraud v. Richmond*, *ibid.* 835; *Cherry v. Heming*, 4 Exch. 631.

(*n*) *Carrington v. Roots*, 2 Mee. & W. 248. See also the provision of the Statute of Frauds (sect. 17) as to contracts for *sale of goods*, *post*, p. 70.

(*o*) By 19 & 20 Vict. c. 97, s. 13, a writing signed by *an agent duly authorized* will suffice.

(*p*) *Hartley v. Wharton*, 11 Ad.

These remarks as to the form of the engagement all apply to *express* contracts, viz., those in which the terms of the agreement are openly uttered and avowed at the time of the making; but there is also a numerous class which are *implied*, that is, resting on a mere construction of law; and in general it will be implied that a man actually promises to fulfil that which he ought to fulfil (*q*). Thus the law imposes on a common innkeeper the duty of securing the goods of his guests in his inn; and there is therefore always an implied contract with each of his guests to that effect (*r*). So, if I employ a person to transact any business for me, or to perform any work, the law implies that I promise to pay him so much as his labour deserves; if I take up wares from a tradesman, without any agreement for price, a promise that I will pay him the value; if I undertake any office, employment, or duty, an engagement that I will perform it with integrity. So a common carrier always impliedly undertakes to be answerable for the goods he carries; a farrier, to shoe a horse without laming him; a tailor or other workman, that he will perform his business in a workmanlike manner: though if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; and the matter turns, in that case, on the express or special agreement which may be made between us (*s*). [And there is also one species of implied contract which runs through and is annexed to all other contracts, con-

& El. 934. By 12 & 13 Vict. c. 106, s. 204, and 24 & 25 Vict. c. 134, s. 164, a man could not, even by a promise in writing, bind himself to pay a debt from which he was discharged in bankruptcy. The present Bankruptcy Act of 1869 (32 & 33 Vict. c. 71), contains no such provision.

(*q*) *Callander v. Oelricks*, 5 Bing. N. C. 58.

(*r*) 3 Bl. Com. 165; see *Fell v. Knight*, 8 Mee. & W. 269. This liability has been, to a certain extent, qualified by a recent statute (26 & 27 Vict. c. 41), as to which vide post, p. 85.

(*s*) 3 Bl. Com. 165, 166. As to the application of the maxim, *spondes peritiam artis*, see *Harmer v. Cornelius*, 5 C. B. (N. S.) 236.

[ditions and covenants, viz., that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (where not in actual possession) do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which indeed is the method taken by the civil law, it having referred the greatest part of the duties and rights of which it treats, to the head of obligations *ex contractu* and *quasi ex contractu* (t).] But it is to be observed, that where there is an express promise, the law does not raise an implied one, in reference to the same matter (u); for *expressum facit cessare tacitum*. Moreover, where there is a contract by deed, even an express parol promise to the same effect, and upon the same subject, has no force; for the contract by speciality merges or extinguishes that by parol (x).

[Again: a contract may be either *executed*,—as if A. agrees to change horses with B., and they do it immediately,—in which case the possession and the right are transferred together; or it may be *executory*,—as if they agree to change next week—in which case the right only vests, and their reciprocal property in each other's horse is not in possession, but in action: for a contract executed, conveys a chose in possession—a contract executory, conveys only a chose in action.]

Having thus shown the general nature of contracts, it is now time to advert to some of the principal rules by which they are governed; among which the following holds a conspicuous place—that a promise by parol only,

(t) Inst. 3, 14, 2.

(u) Per Buller, J., *Toussaint v. Martinnet*, 2 T. R. 105.

(x) See 6 Rep. 45a; per Lord Ellenborough, *Drake v. Mitchell*, 3 East, 259; *Price v. Moulton*, 10

C. B. 561; Bayley on Bills, p. 334; *Sharp v. Gibbs*, 16 C. B. (N. S.) 527; *Saunders v. Milsome*, Law Rep., 2 Eq. Ca. 573; et vide sup. vol. I. p. 482.

is not binding in law unless made upon a *consideration*. By this term we mean some compensation, or *quid pro quo*, to be afforded by the promisee; as where, in return for certain services which another is to render me, I promise to pay him 100*l.*; but if, without reference to services or other equivalent, I simply promise to pay him 100*l.*, there exists in this case (in the language of the law) no consideration (*y*). And however a man may or may not be bound to perform such a promise, in honour or conscience, which the municipal laws do not take upon them to decide, certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law holds, that *ex nudo pacto non oritur actio* (*z*); or, as it may be otherwise expressed, that out of a promise neither attended with particular solemnity (such as belongs to a deed or other specialty), nor with any consideration, no legal liability can arise. But any degree of reciprocity, whether in the way of benefit bestowed by the promisee, or of disadvantage sustained by him, will prevent the pact from being nude (*a*). And as a general rule, the *adequacy* of the consideration is a question that the law will not enter-

(*y*) Considerations are divided by the civilians (says Blackstone, vol. ii. p. 444) into four species. 1. *Do ut des*, as when I give money or goods on a contract that I shall be repaid money or goods for them again. 2. *Facio ut facias*, as where I agree with a man to do his work for him if he will do mine for me. 3. *Facio ut des*, where a man agrees to perform anything for a price. 4. *Do ut facias*, which is the last species inverted. It may be remarked, that contracts based on such considerations have been termed by modern jurists *innominate* real contracts. See Lord Mackenzie, p. 203.

(*z*) Bro. Ab. tit. Debt, 79; Salk.

129. (See *Liversidge v. Broadbent*, 4 H. & N. 610. It is remarked by Blackstone (vol. ii. p. 445), that "our law has adopted this maxim from the civil law," and he cites Cod. 2, 3, 10, and 5, 14, 1. It is, however, noticeable, that the meaning of *nudum pactum* in the two systems of law is very different. See Browne's View of the Civil Law, 1802, vol. i. p. 358, note (cited by Lord Mackenzie, p. 206).

(*a*) See 2 Saund. by Pat. & Will. 137 c; *Wennall v. Adney*, 3 Bos. & Pul. 251, (n.); *Willatts v. Kennedy*, 8 Bing. 8; *Thomas v. Thomas*, 2 Q. B. 851; *Edwards v. Baugh*, 11 Mee. & W. 647.

tain, provided a consideration of *some* value shall appear to have existed at the time of the promise (*b*).

The consideration (like the contract itself) may be either *executed* or *executory*: and its character in this respect is determined by the relation which its performance bears in point of time to the promise, as being either prior or subsequent. Thus, if I bail a man's servant, and the master afterwards promises to indemnify me, this is an executed consideration; but if a man promises to indemnify me in the event of my bailing his servant, the consideration is then executory. And with respect to an executed consideration, the rule is, that if it were not at the express or implied precedent request of the promiser, but a mere voluntary courtesy, it will not suffice to support a promise (*c*): therefore, in the first example the promise would not be binding in law, unless the bailing were at the master's precedent request (*d*).

Considerations are also in some cases said to be *concurrent*, and in others *continuing*: the consideration, in the first case, being simply contemporaneous with the promise; in the latter, having existence before the promise, and also continuing after it is made (*e*). Under the head of concurrent considerations falls the case of *mutual promises*; which is where A. makes a promise to B., in consideration of a contemporaneous promise made by B. to him. Among promises made on *continuing* consideration, may be noticed that class which are founded on *legal liabilities*; as where, in consideration of a sum of money being legally due, the debtor promises to pay

(*b*) See *Hitchcock v. Coker*, 6 A. & E. 456; *Archer v. Marsh*, *ibid.* 967; *Green v. Price*, 13 Mee. & W. 698; *Strickland v. Turner*, 7 Exch. 208.

(*c*) As to the cases in which a request will be implied, see *Exall v. Partridge*, 8 T. R. 310; *Pownall v. Ferrand*, 6 Barn. & Cress. 444;

Pitt v. Purssord, 8 Mee. & W. 538.

(*d*) *Lampleigh v. Brathwait*, Hob. 105; *Hunt v. Bate*, Dy. 272 a; and see *Tipper v. Bicknell*, 3 Bing. N. C. 710; *Eastwood v. Kenyon*, 11 Ad. & El. 452; *Kaye v. Dutton*, 7 Man. & G. 807.

(*e*) Bac. Ab. *Assumpsit* (D.); and see *Tipper v. Bicknell*, *ubi sup.*

This, we may observe, has no immediate reference to any act done or to be done by the other party, that is to any consideration strictly so called; yet it is not a *nudum pactum*, the legal duty being in the nature of a consideration; indeed it is a promise that, even where nothing is expressed between the parties, the law itself (as we have before seen) will imply (*f*). We may remark, too, in connection with this subject, that even a *past* liability will in some cases amount to a sufficient consideration to support an express promise; as if a man promises in writing to pay a just debt, barred by lapse of time, and the payment of which is consequently incapable (but for this promise) of being enforced either at law or in equity (*g*).

The consideration of “blood,” that is natural love and affection,—though for some purposes deemed a *good* one (*h*),—will not suffice to sustain a promise (*i*); and the same may be said as to past considerations of a merely moral nature, binding on the conscience or feelings of the promiser, but not of a kind on which the law would raise any implied contract (*k*). And in every case in which either the consideration or the promise founded upon it is *illegal*,—whether as contrary to the express provisions of law or against its policy (*l*),—or where it is of an *immoral* or *fraudulent* character, the contract is utterly void, and of no effect (*m*).

It is also a rule that the consideration of a promise

(*f*) See 2 Bl. C. 445; Wennall *v.* Adney, 3 Bos. & Pul. 249; Meyer *v.* Haworth, 8 Ad. & El. 467; Monkman *v.* Shepherdson, 11 Ad. & El. 411; Eastwood *v.* Kenyon, *ibid.* 438; Shadwell *v.* Shadwell, 9 C. B. (N. S.) 159.

(*g*) Vide sup. p. 56.

(*h*) Vide sup. vol. I. p. 497.

(*i*) See the authorities cited in the note to Wennall *v.* Adney, 3 Bos. & Pul. 251.

(*k*) See the authorities cited sup. n. (*f*). Also Beaumont *v.* Reeve,

8 Q. B. 483. As to the cases in which the law will raise an implied contract, vide sup. p. 57.

(*l*) Among the contracts against the policy of the law are those in general restraint of marriage, or of trade (see Lowe *v.* Peers, 4 Bur. 2225; Mallam *v.* May, 11 Mee. & W. 653; Sainter *v.* Ferguson, 7 C. B. 716), or such as are tainted with *champerty* (see Grell *v.* Levy, 16 C. B. (N. S.) 73).

(*m*) See Shep. Touch. 164; Steel *v.* Brown, 1 Taunt. 381; Fisher *v.*

must *move* from the promisee; in other words, it must be an act to be performed on his part or by his procurement, and not on the part or by the procurement of a stranger. Thus if there be an agreement between A. and B., for a sufficient consideration, as between themselves, that B. shall pay a sum of money to C., to whom B. promises accordingly to make such payment, yet C., being a stranger to the consideration, can maintain no action on the promise (*u*).

What has already been said, taken in connection with the maxims as to the construction of deeds which were laid down in a former volume, will suffice to give some idea of the law relating to contracts in general (*o*). There are some other rules, however, which apply indifferently to all kinds of contracts, and to these we shall now briefly refer. They relate to the *capacity* of the parties, and to the *construction* and *performance* of the contracts themselves. The first class principally concern the several conditions of infancy, insanity, coverture, and duress; and, respecting these, the following doctrines prevail. *Infants* (that is to say, persons under the age of twenty-one) and persons *insane* (in which class are, for the present purpose, to be included idiots who have had no understanding from their birth, as well as lunatics who, by

Bridges, 3 Ell. & Bl. 642; Feret v. Hill, 15 C. B. 207. A recent case in the equity courts (Smith v. White, Law Rep., 1 Eq. Ca. 626) aptly illustrates this doctrine.

(*u*) Crow v. Rogers, Str. 592. See Twedle v. Atkinson, 1 B. & Smith (Q. B.) 393.

(*o*) Vide sup. vol. I. p. 499. We may remark here, that what is stated sup. vol. I. p. 484, as to the necessity of having a deed properly *stamped* before it can be used in evidence, applies also generally to written agreements not under seal, to bills, notes, &c. (See 33 & 34 Vict. c. 97,

in sched.) There are, however, certain exceptions; among which are that of an agreement, the matter whereof is under 5*l.* in value, and of an agreement relating to the sale of goods and merchandize, or for the hire of labourers, artificers, manufacturers, or menial servants. (Ibid.) See Rodwell v. Phillips, 9 Mee. & W. 506; Melanotte v. Teasdale, 13 Mee. & W. 216; Southgate v. Bohn, 16 Mee. & W. 34; Knight v. Barber, ib. 66; Sadler v. Johnson, ib. 775; Liddiard v. Gale, 4 Exch. 816; Martin v. Wright, 6 Q. B. 917.

disease or accident, have lost the use of their reason), are, to a certain extent, in the same position; that is, they are chargeable for necessaries suitable to their station in life, and actually supplied to them without fraudulent intention (*p*); but, subject to this exception, (which evidently tends to their advantage,) their contracts are not binding upon them in point of law (*q*);—though it is competent to an infant to confirm in writing, after he attains majority, the promises that he made before (*r*). Again, a *married woman* cannot, in general, contract on her own account; nor can she bind her husband, unless as his agent (*s*). So, also, a contract made *under duress* may be avoided by the person whose free will was thus restrained; though he has also an election, if he thinks proper, to insist upon it as a binding transaction (*t*). And to these causes of incapacity, it may be added that a person *drunk* to the extent of complete intoxication, so as to be no longer under the guidance of reason, appears to be absolutely incapable, while that condition lasts, of entering into a valid contract (*u*).

The rules which govern the *construction* or interpretation of a contract, when made, have been so far anticipated

(*p*) See *Baxter v. Lord Portsmouth*, 5 Barn. & Cress. 170; *Harrison v. Fane*, 1 Man. & G. 550; *Peters v. Fleming*, 6 Mee. & W. 42; *Brooker v. Scott*, 11 Mee. & W. 67; *Chapple v. Cooper*, 13 Mee. & W. 252; *Beavan v. Macdonnell*, 9 Exch. 309; 10 Exch. 184.

(*q*) See *Ebbett's case*, Law Rep., 5 Ch. App. 302.

(*r*) 9 Geo. 4, c. 14, s. 5; see *Hartley v. Wharton*, 11 Ad. & El. 934; *Mawson v. Blane*, 10 Exch. 206. Vide sup. p. 56; et post, bk. III. c. IV.

(*s*) But a married woman may make a contract in reference to her dealings with property *settled to her separate use*, within the meaning of the Married Women's

Property Act, 1870 (33 & 34 Vict. c. 93). It may be observed that the *agency* of the wife referred to in the text may be either express or implied by law. See the following among other recent cases, in which have been discussed the circumstances under which a husband is liable on the contract of his wife: *Reid v. Teakle*, 13 C. B. 627; *Reneaux v. Teakle*, 8 Exch. 680; *Johnson v. Sumner*, 3 H. & N. 261; *Atkyns v. Pearce*, 2 C. B. (N.S.) 763. Et vide post, bk. III. c. II.

(*t*) 1 Roll. Ab. 688; *Atlee v. Backhouse*, 3 Mee. & W. 650. As to *duress*, vide sup. vol. I. p. 140.

(*u*) See *Gore v. Gibson*, 13 Mee. & W. 625.

in the chapter which relates to *deeds* (*v*), that it will suffice to refer the reader to that part of the work, and to remark, that the same laws of construction apply, in general, both to sealed and to unsealed agreements.

As a contract to do a thing illegal at a time when the agreement is made is void, so also the *performance* of a contract is held to be excused, whenever, by a subsequent alteration of the law, such performance becomes illegal. Thus if a man covenants to do a certain act, and afterwards, and before the time for doing it arrives, a statute is passed by which an act of that description is prohibited, the statute impliedly repeals the covenant (*x*). But, on the other hand, no excuse is in general afforded by the circumstance that what a man absolutely engaged to do has since become impossible; for it was his own fault to make an unconditional contract (*y*); though if the performance be hindered by the opposite party, the case of course is different, and the party making the engagement is excused (*z*). Performance of a promise will also be excused whenever the promisee has failed on his part to perform the consideration: and independently of the law of promise and consideration, it is to be observed, that a contract, whether by deed or parol, often contains stipulations on both sides of such a nature that the performance of some act, by one of the parties, must be considered as a *condition precedent* to the performance of some act by the other, so that a breach in the prior obligation will excuse a breach in the posterior. But a particular clause in a mutual agreement

(*v*) Vide sup. vol. I. p. 499.

(*x*) Ld. Raym. 321; Hadley v. Clarke, 8 T. R. 259.

(*y*) Co. Litt. 209 a; 1 Shep. Touch. by Prest. 164; and see per Ld. Kenyon, Cook v. Jennings, 7 T. R. 384; Hadley v. Clarke, ubi sup.

(*z*) Co. Litt. 209 a; per Lord Kenyon, Cook v. Jennings, ubi sup. In the case of a penalty, sub-

ject to a *condition*, the obligation will be discharged, not only where the performance is prevented by the opposite party, but also where prevented by the *act of God*. (Co. Litt. 206 a.) But the latter kind of prevention seems to be no excuse in the case of a covenant or promise. (Dy. 33 a; Bullock v. Domitt, 6 T. R. 650. See also the case of Hall v. Wright, 1 E. & E. 746.)

may also be of such a nature that the breach of it may not be sufficient to excuse the opposite party from performance on his side, though it will entitle him to an action for damages: and whether any given clause is to be construed in this latter mode, or as a condition precedent, turns less on any technical rule of interpretation—though many are to be found in the books (*a*)—than on the intention fairly imputable to the parties in each particular case, which will depend on a consideration of the tendency of one construction or the other, in point of natural reason and convenience (*b*).

In speaking of contracts, we have hitherto supposed them to be made between the principal parties themselves: but a contract, of whatever kind, may be entered into either by the parties in person, or by their agents lawfully authorized; a consideration that naturally leads us to take some notice of the relation of *principal and agent*.

An agent may be constituted, either by express appointment, or by implication of law arising from the circumstances in which parties are placed (*c*). The appointment, when express, may in general be made by word of mouth (*d*); though this is subject to exception in certain cases (*e*),—for where any lease of land for above three years, or whereon less than two-thirds of the full improved value shall be reserved as rent, or any uncertain interest in land, is to be created by an agent, or (except in the case of copyhold) to be assigned or surrendered by an

(*a*) See 1 Saund. by Pat. & Will. 320; 2 *ibid.* 352; *Stavers v. Curling*, 3 Bing. N. C. 355.

(*b*) See *Fishmongers' Company v. Robertson*, 5 Man. & G. 198; *Scott v. Parker*, 1 Q. B. 809; *Ireland v. Harris*, 14 Mee. & W. 437; *Macintosh v. Midland Counties Railway*, *ibid.* 548.

(*c*) An infant or a married woman may be an agent, their acts in that

capacity not being affected by their disabilities of infancy and coverture respectively. See *Paley's Princ. and Ag.* 2; *Lindus v. Bradwell*, 5 C. B. 583; *Smith v. Marsach*, 6 C. B. 486.

(*d*) Vide sup. p. 56, n. (*h*), et post, p. 71, n. (*f*).

(*e*) See *Paley's Princ. and Ag.* 132.

agent, his authority must, by the Statute of Frauds, be in writing (*f*); and an agent for a corporation aggregate must in general be constituted not only by writing but by deed (*g*); and in every case where a deed is to be executed by one man as agent (or “attorney”) for another, he must himself be authorized by deed for that purpose (*h*).

An agency, in whatever way constituted, determines *ipso facto* by the death of the principal (*i*); and is also capable of being revoked by him in his lifetime, with as little ceremony as it was created, and at his mere pleasure: but to this there is an exception in the case where an authority is given in pursuance of a contract with another party, and by way of security to him,—as where a man assigns his effects in trust for his creditors, and executes a power of attorney to the trustee to enable him to recover debts, the amount of which is to be applied to the purposes of the trust;—for an authority of this sort is not revocable at the pleasure of the principal (*k*).

Again, an agent may be either *general* or *special*; the former, where a man is empowered to act generally in the affairs of another, or at least to act for him generally in some particular capacity; the latter, where he is authorized to transact for him only in some particular matter. And here the distinction is observable, that so far as concerns the rights of strangers who deal with one who is known to them as a general agent of the principal, without notice of any particular restriction placed on his powers, he shall be presumed to have authority for what he does, provided it fall within the limits ordinarily belong-

(*f*) 29 Car. 2, c. 3, ss. 1, 2, 3. It will be remembered that such lease, surrender or assignment itself must not only be in writing (under the Statute of Frauds), but also by deed, under 8 & 9 Vict. c. 106. Vide sup. vol. I. pp. 513, 523, 526.

(*g*) Plowd. 91; see Mayor of

Ludlow v. Charlton, 6 Mee. & W. 815.

(*h*) See Harrison v. Jackson, 7 T. R. 209; Elliott v. Davies, 2 Bos. & Pul. 338.

(*i*) See Smout v. Ilbery, 10 Mee. & W. 1.

(*k*) Paley, Princ. and Ag. 156, 2nd edit.

ing to the kind of employment which he exercises; and this even though in fact he may be violating the direction privately given in the particular case by his employer (*l*): but the power of a special agent, *i.e.*, one employed in a single transaction, is strictly bounded by the authority he has actually received; so that a stranger who deals with him has no right to consider his acts as binding on the employer, if it should turn out that the instructions of the latter have been violated (*m*). But where that which is done by an agent (of any description) is without sufficient authority, it is always capable of being made good by the subsequent assent of the principal: and the effect, in such event, is exactly the same as if full power had been originally given; the maxim of law on this subject being, that every ratification is retrospective, or, as it is commonly expressed, *omnis ratihabitio retrò trahitur, et mandato æquiparatur*.

A contract duly made by an agent, is in law the contract of the principal; from which it follows that such principal is entitled to enforce it by suit in his own name, and is also liable to be personally sued thereon: and the case will be the same though the agent should have made the contract as if he were himself the party interested, and without disclosing the capacity in which he acted. Yet in the case last supposed, the agent, having pledged his own personal credit, would be liable (not less than the principal) to be personally charged on the contract; though, supposing him to have made it professedly on behalf of another person, and without any expressions indicative of an intention to bind *himself*, no such liability could have attached to him (*n*).

(*l*) See *Howard v. Sheward*, Law Rep., 2 C. P. 148; *Henkel v. Pape*, *ib.*, 8 Exch. 7.

(*m*) See *Fenn v. Harrison*, 4 T. R. 177; *Trueman v. Loder*, 11 Ad. & El. 593.

(*n*) The cases which turn upon

the respective liabilities of the agent and of the principal on contracts made by the former are very numerous. The following may be consulted with advantage:—*Goodhaylie's case*, Dy. 230; *Appleton v. Binks*, 5 East, 148; *Paterson v.*

To these remarks we may add, that an agent is always incompetent, without special authority for that purpose, to appoint another person to act in his stead; the maxim of law being, that *delegatus non potest delegare* (*p*).

Having now attempted to trace the principal lineaments of the law of contract, generally considered, we shall devote the remainder of the chapter to an examination of such particular species of contract, relative to things personal, as are of superior interest and importance; without further reference in this place to such contracts as concern the realty, which have been sufficiently noticed in the first part of this Book (*q*). And at the head of these, we may place,

I. *The contract of sale.*

This is a contract for the transmutation of property from one man to another, for a price (*r*). [If it be a commutation of goods for goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a *sale*; which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas, if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations therefore

Gandasequi, 15 East, 62; Addison v. Gandasequi, 4 Taunt. 574; Thomson v. Davenport, 9 Barn. & Cress. 78; Sims v. Bond, 5 B. & Ad. 389; Amos v. Temperley, 8 Mee. & W. 798; Carr v. Jackson, 7 Exch. 382; Udall v. Atherton, 7 H. & N. 172; Jones v. Downham, 4 Q. B. 235; Schmaltz v. Avery, 16 Q. B. 655; Smyth v. Anderson, 7 C. B. 21; Green v. Kopke, 18 C. B. 549; Cooke v. Wilson, 1 C. B. (N. S.)

153; Risbourg v. Bruckner, 3 C. B. (N. S.) 812; Kelner v. Baxter, Law Rep., 2 C. P. 174; Barwick v. English Joint Stock Bank, ib. 2 Exch. 259.

(*p*) 9 Rep. 77 b; Coles v. Trecothick, 9 Ves. 251; Blore v. Sutton, 3 Meriv. 237.

(*q*) Vide sup. vol. I. pp. 467—501.

(*r*) Noy, Max. 42.

[adopted very early the use of money, for we find Abraham giving “four hundred shekels of silver, current money with “the merchants,” for the field of Macpelah (*s*); though the practice of exchange still subsists among several of the savage nations. But with regard to the *law* of sales and exchanges there is no difference: we shall therefore treat of them both under the denomination of sales only.]

A contract of sale implies a bargain, or mutual understanding and agreement between the parties as to terms; and the law as to the transmutation of property under such contracts may be stated generally, as follows. If the vendor says the price of the goods is 4*l.*, and the vendee says he will give 4*l.*, the bargain is struck; and if the goods be thereon delivered or tendered, or any portion of them if such portion be accepted by way of earnest (*t*), or if the price be paid or tendered, or any part of the price be paid down and accepted (if it be but a penny), the property in the goods is thereupon transmuted, and vests immediately in the bargainee; so that in the event of their being subsequently damaged or destroyed, he and not the vendor must stand to the loss (*u*). This supposes (it will be observed) the case of a sale for ready money; but if it be a sale of goods to be delivered forthwith, but to be paid for afterwards, the property passes to the vendee immediately upon the striking of the bargain without either delivery on the one hand or payment on the other (*x*).

(*s*) Gen. c. xxiii. v. 16.

(*t*) *Earnest* is called in the civil law *arra* (see Inst. 3, t. 23). Antiently, among all the northern nations, shaking of hands was held necessary to bind the bargain, a custom which we still retain, says Blackstone, (vol. ii. p. 448,) in many verbal contracts. A sale thus made was called *handsale—renditio per mutuum manuum complexionem*—(Stiernh. de Jure Goth. l. 2, c. 5), till in process of time the same word

was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

(*u*) See Shep. Touch. 224, 225; Dy. 30 a; Hob. 41; Noy, Max. c. 42; 2 Kent's Com. 388; Langfort v. Tiler, 1 Salk. 113; 2 Bl. Com. 447; Hinde v. Whitehouse, 7 East, 571.

(*x*) Hob. 41; Noy, Max. 87; Dy. 30, 76; Shep. Touch. 222; and see Clarke v. Spence, 4 Ad. & El. 469.

These doctrines, however, with respect to the time at which the property vests, refer only to a sale of *specific* goods; for in other cases, no property passes until the particular goods be ascertained by delivery (*y*). They also refer to the case where the goods are at the time of sale in a condition to be immediately delivered; for while any previous act remains to be done to them on the part of the vendor, they continue always at his risk (*z*).

There is a distinction, too, between the vesting of the property, and the vesting of the right of possession (*a*); for even in the case of a sale of specific and finished goods (if for ready money), the vendee cannot take the goods until he tenders the whole price agreed on. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them (*b*).

All that has been said with respect to a contract of sale, is also to be taken as subordinate to the provisions of the Statute of Frauds. For by 29 Car. II. c. 3, s. 17, it is enacted, that no contract for the sale of any goods (*c*), wares or merchandizes, *for the price of 10l. sterling, or upwards*, shall be allowed to be good,—except the buyer shall accept part of the goods, and actually receive the

But if there be a fraudulent intention on the part of the vendee at the time, not to pay for the goods, the property does not pass. (*Noble v. Adams*, 7 Taunt. 59.)

(*y*) Per Holroyd, J., *Simmons v. Swift*, 5 Barn. & Cr. 864; per Parke, J., *Dixon v. Yates*, 5 Barn. & Ad. 340. By 19 & 20 Vict. c. 90, s. 2, the plaintiff in an action on breach of a contract to deliver specific goods for a price in money may now recover the goods *specifically*, and not merely damages for their non-delivery. This could not formerly be done, though relief might

in certain cases be had in equity.

(*z*) See *Simmons v. Swift*, 5 Barn. & Cress. 857; *Tansly v. Turner*, 2 Bing. N. C. 151; *Young v. Matthews*, Law Rep., 2 C. P. 127. As to the passing of property under ship-building contracts, where the price is paid by instalments during the progress of the work, see *Clarke v. Spence*, 4 Ad. & E. 448.

(*a*) 2 Kent, Com. 387.

(*b*) *Waterhouse v. Skinner*, 2 Bos. & P. 447.

(*c*) See *Lee v. Griffin*, 1 B. & S. 272.

same (*d*); or unless he shall give something in earnest to bind the bargain, or in part payment (*e*); or unless some memorandum or note in writing, of the same bargain, be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized (*f*): In addition to which it was at a later period provided by the 7th section of Lord Tenterden's Act (9 Geo. IV. c. 14), that the enactment on this head contained in the Statute of Frauds shall extend to all contracts for the sale of goods of the value aforesaid, notwithstanding that the goods may be intended to be delivered at some future time (*g*); or may not at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery; or notwithstanding that some act may be requisite for the making or completing thereof, or rendering the same fit for delivery (*h*).

If the vendor of goods transmit them to the vendee, without receiving payment of the price, and afterwards

(*d*) See *Bell v. Lament*, 9 Mee. & W. 36; *Acraman v. Morrice*, 8 C. B. 449; *Saunders v. Topp*, 4 Exch. 390; *Hunt v. Hecht*, 8 Exch. 814; *Holmes v. Hoskins*, 9 Exch. 753; *Tomkinson v. Staight*, 17 C. B. 697; *Gardner v. Gront*, 2 C. B. (N. S.) 340; *Hart v. Bush*, 1 E. & E. 494; *Coombs v. The Bristol and Exeter Railway Company*, 3 H. & N. 510; *Castle v. Swarder*, 5 H. & N. 281; *Cusack v. Robinson*, 1 B. & S. 299.

(*e*) See *Walker v. Nussey*, 16 Mee. & W. 302.

(*f*) The agent for this purpose need not be appointed by writing. (*Chitty on Contr.* 5th ed. p. 196.) See as to the 17th section of the Statute of Frauds, the following recent cases in addition to those already cited:—*Richardson v. Dunn*, 2 Q. B. 218; *Marshall v. Lynn*, 6

Mee. & W. 109; *Thornton v. Charles*, 9 Mee. & W. 802; *Chapman v. Morton*, 11 Mee. & W. 534; *Norman v. Phillips*, 14 Mee. & W. 277; *Fricker v. Tomlinson*, 1 Man. & Gr. 772; *Archer v. Baynes*, 5 Exch. 625; *Harman v. Reeve*, 18 C. B. 587; *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188. As to its construction in reference to the sale of *scrip* or *shares*, see *Humble v. Mitchell*, 11 Ad. & El. 205; *Tempest v. Kilner*, 3 C. B. 249; *Bowlby v. Bell*, ib. 284; *Watson v. Spratley*, 10 Exch. 223. As to *bought and sold notes*, see *Sieveright v. Archibald*, 20 L. J., Q. B. 529; *Parton v. Crofts*, 16 C. B. 11.

(*g*) See *Harman v. Reeve*, ubi sup.

(*h*) See *Elliott v. Pybus*, 10 Bing. 512.

becomes apprised that the latter is insolvent, the law allows him the privilege of *stoppage in transitu*; that is, it entitles him while the goods are still in their transit, and not yet delivered to the vendee, to reclaim them, and to determine, or at least to suspend the performance of, the contract of sale (*h*). Nor will this right be affected though the vendor has consigned the goods to the vendee under a bill of lading (*i*); but if the latter has indorsed it to a third party, for valuable consideration, who received it without notice that the consignee was insolvent and the consignor unpaid, such party's claim, as assignee of the property under the bill of lading, is paramount to the consignor's right to stop *in transitu* (*k*).

Though, in general, it is only from the owner that any property in goods can be derived, yet (as we have already had occasion to remark) goods may, in certain cases, be effectually transferred to a purchaser by one who has himself no title (*l*); for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase, otherwise all commerce between man and man would soon be at an end. [And hence it is the general rule, that all sales and contracts of any thing vendible in fairs or in markets *overt* (that is *open*) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the *Mirroure* informs us, were tolls established in markets, viz. to testify the making of con-

(*h*) See *Hodgson v. Loy*, 7 T. R. 440; *Mills v. Bull*, 2 B. & P. 457; *Litt v. Cowley*, 7 Tannt. 169; *Ruck v. Hatfield*, 5 B. & Ald. 632; *Edwards v. Brewer*, 2 Mee. & W. 379; *Wentworth v. Outhwaite*, 10 Mee. & W. 436; *Tanner v. Scovell*, 14 Mee. & W. 28; *Jackson v. Nicol*, 5 Bing. N. C. 508; *Dodson v. Wentworth*, 4 Man. & G. 1080; *Wilms-hurst v. Bowker* (in error), 7 Man. & Gr. 882; *Valpy v. Gibson*, 4 C. B.

837; *Bird v. Brown*, 4 Exch. 786; *Gurney v. Behrend*, 3 Ell. & Bl. 622; *Heinekey v. Earle*, 8 Ell. & Bl. 410.

(*i*) See 18 & 19 Vict. c. 111, s. 2; sup. p. 49.

(*k*) See *Lickbarrow v. Mason*, 2 T. R. 63; 6 T. R. 131; 1 H. Bl. 357; *Re Westzinthus*, 5 B. & Ad. 817; *Jones v. Jones*, 8 Mee. & W. 431.

(*l*) Vide sup. p. 52.

[tracts (*m*). For every private contract was discountenanced by law, insomuch that our Saxon ancestors prohibited the sale of anything above the value of 20*d.*, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses (*n*). Market overt, in the country, is only held on the special days provided for particular towns, by charter or prescription; but in the city of London every day, except Sunday, is market day (*o*). The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt (*p*); but in London every shop in which goods are exposed publicly for sale is market overt, though only for such things as the owner professes to trade in (*q*).

To the general rule as to the binding effect of a sale in market overt, there are, however, some exceptions. For if the goods be *crown* property, such sale (though regular in all other respects) will in no case bind the crown; and this, though a sale of this nature binds infants, femmes covert, idiots or lunatics, and men beyond seas, or in prison. Nor is the owner bound if the buyer knoweth the property not to be in the seller; or if there be any other fraud in the transaction, as if he knoweth the seller to be an infant or under other disability; or if the sale be not originally and wholly made in a fair or market, or not at the usual hours (*r*). Moreover, if a man buys his own goods in a fair or market, a contract of sale shall not bind him (so that he shall be compelled to render the price), unless the property had been previously altered by

(*m*) Cap. 6, s. 8.

(*n*) Wilkins's Leg. Anglo-Sax. Ll. Ethel. 10, 12, Ll. Eadg. 80.

(*o*) Taylor v. Chambers, Cro. Jac. 68. By 27 Hen. 6, c. 5, all fairs and markets, on certain principal feasts, and Sundays and Good Friday, shall cease as therein mentioned, *the four Sundays in harvest*

excepted. But by 13 & 14 Viet. c. 23, that exception is repealed.

(*p*) Godb. 131.

(*q*) 5 Rep. 83; 12 Mod. 521. As to the markets in London, see Pulling on the Customs of London, p. 401.

(*r*) 2 Inst. 713, 714.

[a former sale (*s*). And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them when found in his hands who was guilty of the first breach of justice (*t*). By which wise regulations, the law has secured the right of the proprietor in personal chattels from being divested: so far at least as was consistent with that other necessary policy, that *bonâ fide* purchasers in a fair, open and regular manner should not be afterwards put to difficulties by reason of the previous knavery of the seller.]

A *bonâ fide* purchase in market overt will, therefore, as the general rule, vest in the buyer the property in what he has so bought, even though it was *stolen* or obtained in some other criminal way from the owner, unless indeed such owner shall prosecute the offender to conviction and obtain an order of restitution (*u*), to which he will be entitled notwithstanding an intervening sale in market overt (*x*). And if my goods are stolen or in any other way wrongfully taken from me and sold *out* of market overt, my property is not altered, and I may re-take them wherever I find them or recover their value from an innocent vendee (*y*). In aid of this right, it has been enacted by the Pawnbrokers Act, 1872 (in substitution for a previous provision to the same general effect), that a person suspecting any article of which he is the owner to have been unlawfully pawned, and on oath satisfying a justice that there is good cause and probable ground for such suspicion, may obtain a warrant for searching the house of the pawnbroker; and if on such search the goods shall be found,

(*s*) Perk. s. 93.

(*t*) 2 Inst. 713.

(*u*) In such case, by 30 & 31 Viet. c. 35, s. 9; compensation to the innocent buyer may be directed by the court out of any monies taken on the thief (vide post, bk. VI. ch. XXII.)

(*x*) 2 Inst. 714; 1 Hale, P. C.

543; Horwood v. Smith, 2 T. R. 750; Featherstonhaugh v. Johnston, 8 Taunt. 239; Scattergood v. Sylvester, 15 Q. B. 506; 24 & 25 Viet. c. 96, s. 100.

(*y*) See Peer v. Humphrey, 2 Ad. & El. 495; White v. Spettigue, 13 Mee. & W. 603.

and the property of the claimant proved, he shall be entitled to have them restored (*z*).

There are some species of personal property, moreover, with regard to the transfer of which by sale special regulations have been made by the legislature. Thus with regard to *horses*, a purchaser gains no property in one which has been stolen, unless he not only buys it in a fair or market overt, but also according to the directions of the statutes 2 P. & M. c. 7, and 31 Eliz. c. 12 (*a*). [And by these it is enacted, that the horses shall be openly exposed in the time of such fair or market for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and shall afterwards be brought by both the vendor and vendee to the bookkeeper of such fair or market: who shall enter down the price, colour, and marks of such horse, with the name, additions and abode of such vendee and vendor, the latter being properly attested. And that even such sale shall not take away the property of the owner, if within six months after the horse is stolen he put in his claim before some magistrate where the horse shall be found: and within forty days more prove such his property, by the oath of two witnesses, and tender to the person in possession such price as he *bonâ fide* paid for the horse in market overt. And in case any of the points before mentioned be not observed, such sale is to be utterly void, and the owner shall not lose his property; and at any distance of time may seize or bring an action for his horse, wherever he happens to find him (*b*).] So also, in order to prevent an inexpedient traffic in shares and stock of *joint stock banking companies* of which the sellers are not possessed, or over which

(*z*) 35 & 36 Vict. c. 93, s. 36.

(*a*) 2 Inst. 713.

(*b*) As to the sale of stolen horses, see 2 Chit. Com. L. 151; Com. Dig. Market (E); Gibbs' case, Owen, 27;

* 1 Leon. 158; Wikes *v.* Morefoots, Cro. Eliz. 86; Joseph *v.* Adkins, 2 Stark. 76; Lec *v.* Bayes, 18 C. B. 599.

they have no control, it has recently been enacted by 30 & 31 Vict. c. 29, that all contracts, agreements and tokens for the sale or transfer of such shares or stock shall be null and void, unless the same shall set forth and designate in writing the numbers of such shares, stock, or interest, as the same are distinguished on the register or books of the company.

With respect to warranty of *title* on the part of the vendor, it is to be remarked that if a person sell goods and chattels as his own, and the price be paid, and the title prove deficient, he may be compelled to refund the money to the purchaser, on the ground of failure in the consideration on which it was paid (*c*). But with regard to the *soundness* of the wares purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound (*d*); or unless he knew them to be faulty, and yet represents them to be sound or uses any art to disguise them (*e*). For in this matter, the maxim of our law is *caveat emptor* (*f*); and the application of this maxim is not affected by the circumstance that the price was such as is usually given for a sound commodity (*g*). Yet upon

(*c*) See *Crosse v. Gardner*, Carth. 90; *Medina v. Stoughton*, Salk. 210; Ld. Raym. 593; per Buller, 3 T. R. 57; *Furnis v. Leicester*, Cro. Jac. 474; 1 Roll. Ab. 90; *Sims v. Marryat*, 17 Q. B. 281; *Bandy v. Cartwright*, 8 Exch. 918; *Hall v. Conder*, 2 C. B. (N. S.) 40. See also 3 Bl. Com. 166; 2 Kent, Com. 374.

(*d*) See F. N. B. 94; *Chandeler v. Lopus*, Cro. Jac. 4; *Parkinson v. Lee*, 2 East, 314; *La Neuville v. Nourse*, 3 Camp. 351; *Ormrod v. Huth*, 14 Mee. & W. 664; *Ollivant v. Bayley*, 5 Q. B. 288; *Camac v. Warriner*, 1 C. B. 356; *Burnby v. Bollett*, 16 Mee. & W. 644; *Hall v. Conder*, *ubi sup*.

(*e*) 2 Roll. Rep. 5.

(*f*) It may be worth remark here, that the rules of the civil law for the protection of the buyer were more stringent than our own. For the purchaser was entitled within a certain period, by the actions known as *redhibitoria* and *quanti minoris*, to rescind the contract altogether, or obtain the return of a portion of the price, according to the gravity of the defect he discovered. Lord Mackenzie, in his *Studies of Roman Law*, p. 208, cites on this subject Maynz *Éléments du Droit Romain*, s. 296.

(*g*) Although the subject of sale of the *realty* is not immediately under our consideration, it may be worth while here to refer to a recent statute

a contract for the purchase of goods of any particular denomination, where the purchaser has no opportunity of inspecting them before they are delivered, there is an implied warranty, on the part of the seller, that they shall be of a quality saleable in the market under the denomination in question (*h*); and, whether there is an opportunity of inspection by the buyer or not, the seller of an ordinary commodity manufactured in the particular instance by himself, and bought for a known and ordinary purpose, impliedly warrants (as it should seem) that it has no latent defect to make it unfit for that purpose (*i*). As to an *express* warranty, it is to be observed, that it may relate not only to the title to or soundness of the article, but to its quality in any respect; and further, that the use of the word *warrant* is not in any case essential, for a mere representation may amount to a warranty (*k*). And it will be a question for a jury whether, under the circumstances, it was so understood by the parties; or whether, on the other hand, it was a mere commendation by the seller of his own wares (*l*).

In mercantile transactions, the sale of goods is frequently effected by *factors* or by *brokers*,—both being agents remunerated by a commission, though otherwise differing considerably in their capacities. For factors are

regulating the sale of land by auction, and so far passing by the general maxim of *caveat emptor* as to render invalid any contract at such a sale whereat a *puffer* is surreptitiously employed. This is the 30 & 31 Viet. c. 48; as to which, see Gilliat *v.* Gilliat, Law Rep., 9 Eq. Ca. 60.

(*h*) See Brown *v.* Edgington, 2 Man. & Gr. 279; Young *v.* Cole, 4 Scott, 489; Wieler *v.* Schilizzi, 17 C. B. 619; Gompertz *v.* Bartlett, 2 Ell. & Bl. 849.

(*i*) See Jones *v.* Bright, 5 Bing. 533; Chanter *v.* Hopkins, 4 Mee. &

W. 399; Shepherd *v.* Pybus, 2 Man. & Gr. 868; Parson *v.* Sexton, 4 C. B. 899; Prideaux *v.* Bunnett, 1 C. B. (N. S.) 613; Hall *v.* Conder, 2 C. B. (N. S.) 40; Horsfall *v.* Thomas, 1 Hurl. & Colt. 90.

(*k*) Thorogood's case, 2 Co. Rep. 9 a, b.

(*l*) See Vernon *v.* Keyes, 12 East, 632; 4 Tannt. 488; Budd *v.* Fairmaner, 8 Bing. 52; Power *v.* Barham, 4 Ad. & El. 473; Freeman *v.* Baker, 5 Ad. & El. 797; Hopkins *v.* Tanqueray, 15 C. B. 130.

entrusted with the possession of the goods, and authorized to sell them in their own names, as the apparent owners; while brokers have no possession or apparent ownership, and act avowedly as agents between two contracting parties (*n*). Neither one nor the other description of agents are, generally speaking, answerable for the due payment of the price by the party to whom they sell. But a factor sometimes makes sales on what is called a *del credere* commission; in which case he does undertake to be responsible for the payments; and receives on that ground a higher rate of remuneration from his employer (*o*).

At common law, if such factor or broker, or any agent entrusted with goods, disposed of them to a stranger in a way not warranted by the nature of his authority,—as even if he pledged them when authorized only to sell—the title so derived from him would be ineffectual against the employer (*p*). But for the protection of strangers who deal with persons entrusted with the possession of goods, or the written *indicia* of property in them, and the extent of whose authority they have no means of ascertaining, several provisions are contained in 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; and 5 & 6 Vict. c. 39 (*q*). The

(*n*) By 6 Anne, c. 16, brokers in the city of London were required to be licensed by the lord mayor and aldermen, but this is not now required. (33 & 34 Vict. c. 60.) As to the law in regard to transactions effected by factors and brokers, see *Baring v. Corrie*, 2 Barn. & Ald. 137; *Pott v. Turner*, 6 Bing. 702; *Boorman v. Brown*, 3 Q. B. 511; *Smart v. Sandars*, 3 C. B. 380; 5 C. B. 895; *Fish v. Kempton*, 7 C. B. 687; *Parton v. Crofts*, 16 C. B. (N. S.) 11; *Borrowman v. Rossel*, ib. 58.

(*o*) See *Grove v. Dubois*, 1 T. R.

112; *Conturier v. Hastic*, 8 Exch. 40, 56; 9 Exch. 102; 25 L. J., Dom. Proc. 253; *Catterall v. Hindle*, Law Rep., 1 C. P. 186.

(*p*) See *Paterson v. Tash*, 2 Str. 1178; *Daubigny v. Duval*, 5 T. R. 604; *Martini v. Coles*, 1 Mau. & Sel. 146.

(*q*) The following are useful decisions on the Factors' Acts: *Fletcher v. Heath*, 7 B. & C. 517; *Evans v. Trueman*, 2 B. & Adol. 886; *Taylor v. Kymer*, 3 B. & Adol. 320; *Robertson v. Kensington*, 5 M. & Ry. 381; *Hatfield v. Phillips*, 12 Cl. & Finn. 343; *Learoyd v. Robinson*,

most material of these are, that any person entrusted, for the purpose of consignment or sale, with any goods, and who shall have shipped them in his own name—and any person in whose name goods shall be shipped by any other person—shall be deemed the true owner, so far as the consignee's security for his advances thereon is concerned, provided such consignee had no notice, at the time of the advances, that the ostensible shipper was not the actual owner. Also, that any person entrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for the delivery of goods, shall be deemed the true owner of the goods mentioned in the document, so as to give validity to any contract for the sale of the goods; provided the purchaser had no notice that the seller was not the true owner. Moreover, that where an agent is entrusted with or is consignee of goods, any person, though aware of his being an agent only, may contract with him for the purchase of such goods, and pay him for the same; and such contract and payment will be binding on the owner, provided they be made in the usual course of business, and the purchaser had no notice at the time that the agent so contracting was not authorized to sell the goods or receive the money. And, lastly, that any agent entrusted with the possession of goods, or of such documents of title as aforesaid, or any other document used in the ordinary course of business as proof of the possession or control of goods, is to be deemed the owner of the goods and documents, so far as to give validity to any contract *bonâ fide* made with him for pledge of the goods or documents by way of security for advances; and this even though the pledgee

12 Mee. & W. 745; *Van Casteel v. Booker*, 2 Exch. 691; *Lamb v. Attenborough*, 1 B. & S. (Q. B.) 831; *Sheppard v. The Union Bank of London*, 7 H. & N. 661; *Heyman v.*

Flewker, 13 C. B. (N. S.) 519; *Baines v. Swainson*, 4 B. & Smith, 270; *Jewan v. Whitworth*, Law Rep., 2 Eq. Ca. 692; *Portalis v. Tetley*, ib., 5 Eq. Ca. 140.

have notice that the person with whom he contracts is only an agent, provided only he has no notice that such agent is without authority to make the contract, or is acting *malâ fide* as against the owner of the goods.

II. *The contract of bailment.*

Bailment, from the French *bailler*, to deliver, is a delivery of goods for some purpose, upon a contract, express or implied, that, after the purpose has been fulfilled, they shall be re-delivered to the bailor, or otherwise dealt with according to his directions, or (as the case may be) kept till he reclaims them (*r*). [Thus if cloth be delivered, or, in our own legal language, *bailed* to a tailor, to make a suit of clothes, he has it upon an implied contract to render it again when made. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to carry them to the person appointed (*s*). If a horse or other goods be delivered to an innkeeper, or his servants, he is bound to keep them safely, and restore them when his guest leaves the house (*t*). If a man take in a horse or other cattle to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them, on demand, to the owner (*u*). If a debtor bail or *pawn* his goods to his creditor, the pawnee has them on the condition of restoring them on the debt being discharged (*x*). If a pawnbroker receive plate or jewels

(*r*) Blackstone (vol. ii. p. 451) defines bailment as "a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee." But this does not point to the duty of re-delivery or delivery over according to the directions of the bailor, which seems to be usually involved in the idea of

a bailment. (See Jones on Bailm. 1; Story on Bailm. 2.)

(*s*) Lane v. Cotton, 12 Mod. 482; see Black v. Baxendale, 1 Exch. 410.

(*t*) Cross v. Andrews, Cro. Eliz. 622. Vide post, p. 85.

(*u*) Chapman v. Allen, Cro. Car. 271; Corbett v. Packington, 6 Barn. & Cress. 268.

(*x*) Jones on Bailm. pp. 36, 118.

[as a pledge or security for the repayment of money lent thereon at a day certain, he has them upon a contract or condition to restore them if the pledger performs his part by redeeming them in due time (*y*);] or even if he is ready to redeem them while the article still remains in the hands of the pawnbroker unsold (*z*): and for the due execution of this contract by the pawnbroker, many useful provisions have been made by statute, and have recently been amended by the Pawnbrokers Act, 1872 (*a*). Again; if a friend deliver anything to his friend to keep for him, the receiver is bound to restore it on demand (*b*). If a chattel be lent, the borrower is bound to return it when the period of the loan is expired. If a chattel be let out on hire for a stipulated time, or for a particular service, the hirer is under obligation to restore it when the time is run out, or the service performed. And so in other instances of bailment (*c*).

There is a difference as to the degree of responsibility to which bailees under different circumstances are subject. On this matter the early authorities were in some measure at variance; but it is now distinctly held to depend upon the general rules which follow;—first, that upon a bailment for the mutual benefit of bailor and bailee, the latter

(*y*) *Ratcliff v. Davies*, Cro. Jac. 245.

(*z*) *Walter v. Smith*, 5 Barn. & Ald. 439.

(*a*) 35 & 36 Viet. c. 93. By this statute the 39 & 40 Geo. 3, c. 99, and other previous enactments with regard to pawnbrokers are repealed.

(*b*) 2 Bl. Com. p. 452.

(*c*) In the present work the example of Blackstone (vol. ii. p. 453) is followed, in declining any attempt to distinguish into classes the different bailments. It has been done with great precision by Sir W. Jones,

in his celebrated work on that subject, where he recognizes five sorts, viz. 1, *Depositum*; 2, *Mandatum*; 3, *Commodatum*; 4, *Pignori acceptum*; 5, *Locatum*. But this division (taken from the phraseology of the Roman law) does not entirely accommodate itself to the distinctions which practically exist among us with respect to bailments in the business of life. *Locatum*, for example, comprises under the same general head, the very dissimilar cases of taking a chattel on hire, taking it to perform work upon it, and taking it to convey as a carrier.

is liable for *negligence*, viz. for the omission of that degree of care which a man of common prudence takes of his own concerns; secondly, that upon a bailment from which the bailee derives no benefit, nothing short of *gross* negligence will make him responsible; thirdly, that upon a bailment for his own exclusive benefit, the bailee will, on the other hand, be chargeable even for *slight* negligence; and lastly, that he is liable, in none of these cases, for a robbery or other casualty in no degree attributable to his own fault (*c*). These rules, however, are subject to exception in the case of some particular kinds of bailees, (as we shall have occasion presently to explain); and they are in every case liable to be controlled by the express contract of the parties.

[It is, moreover, a doctrine universally applicable to bailment, that there is a special qualified property transferred from the bailor to the bailee, together with the possession (*d*). It is not an absolute property, because of his contract for restitution; the bailor having still left him the right to a chose in action, grounded upon such contract (*e*). And on account of this qualified property of the bailee, he, as well as the bailor, may maintain an action against such as injure or take away the chattels. The tailor, the carrier,

(*e*) See *Coggs v. Bernard*, 1 Id. Raym. 909; *Kettle v. Bromsell*, Willes, 121; *Shiells v. Blackburne*, H. Bl. 162; *Dean v. Keate*, 3 Camp. 4; *Dartnall v. Howard*, 4 Barn. & Cress. 345; *Doorman v. Jenkins*, 2 Ad. & El. 256; *Cairns v. Robins*, 8 Mee. & W. 258; *Wilson v. Brett*, 11 Mee. & W. 113; *Syred v. Caruthers*, 1 E. & E. 469. That want of care which we have described in the text simply as *negligence*, which is conceived to be the term most usually applied to it, is called by Sir W. Jones *ordinary neglect*; and he defines the different degrees of negligence thus: "*Ordinary neglect* is "the omission of that care which

"every man of common prudence
"and capable of governing a family,
"takes of his own concerns; *gross*
"neglect is the want of that care,
"which every man of common sense,
"how inattentive soever, takes of
"his own property; *slight neglect*
"is the omission of that diligence
"which very circumspect and
"thoughtful persons use in secur-
"ing their own goods and chattels."
—Jones on Bailm. 118, 119.

(*d*) Vide sup. p. 10.

(*e*) As to the case of the pawnee's re-pledging the bailment to a third party, see *Donald v. Suckling*, Law Rep., 1 Q. B. 585, 618.

[the innkeeper, the agisting farmer, the pawnbroker, the borrower, the hirer, or any other bailee, may respectively vindicate, in their own right, this their possessory interest, against any stranger or third person (*f*).] For the bailee being responsible to the bailor, if the goods be damaged while in his custody or if he do not deliver them up on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may injure them or take them away; so that he may always be ready to answer the call of the bailor.

Bailees have also, in certain instances, that right which is technically called a *lien*, in respect of the goods committed to their charge. A lien is the right of a bailee to retain the possession of a chattel entrusted to him until his claim upon it be satisfied; and the rule of law is, that every person to whom a chattel has been delivered for the purpose of bestowing his labour upon it, has a lien thereon; and may withhold it from the owner (in the absence at least of any special agreement to the contrary) until the price of that labour is paid. For example, in the first of the instances above given, the tailor is not bound to deliver up the clothes which he has made, except upon receiving the price which is justly due for the making (*g*). But besides this species, which is called a *particular* lien, the law also recognizes a *general* lien; which is the right of a bailee to detain a chattel from its owner until payment be made, not only in respect of that particular article, but of any balance that may be due, on a general account between the bailor and himself, in the same line of business. These general liens, indeed, being beyond the ordinary rule of law, depend entirely upon a contract, either express, or implied from the usage of the particular trade or business or from the previous course of dealing between the parties (*h*). And such usage

(*f*) Heydon and Smith's case, 13 Rep. 69.

(*g*) Chapman v. Allen, Cro. Car. 272.

(*h*) As to the subject of lien generally, the following cases may be advantageously consulted: Green v. Farmer, 4 Burr. 2222; R. v. Sankey,

has been established in the case of attorneys, bankers, factors, and warehousemen; and all of these (as also some other traders not here enumerated) have consequently a lien for the amount of the general balance due to them from their customers (*i*). Moreover, by 6 Geo. IV. c. 94, the consignees of goods sent from abroad by sea to this country, have a lien thereon for any advances made to or for the use of the persons in whose names the same shall have been shipped, whether the latter be the true owners of the goods or not; provided the consignees had no notice when the advance was made, that they were not the true owners (*j*).

Before we quit the subject of bailment, we must advert to two kinds of bailees, namely, innkeepers and carriers, who are both subject, by the custom of the realm, to a higher degree of responsibility than that which we have explained to attach to bailees in general. And first, a *common innkeeper*—which includes the keeper of every tavern or coffeehouse in which lodging is provided—is held responsible by the common law for the goods and chattels brought by any traveller to his inn, in the capacity of guest there, in every case where they are either lost, damaged or stolen (*k*): with the exception only of

5 Ad. & El. 423; *Reeves v. Capper*, 5 Bing. N. C. 136; *Ferguson v. Norman*, *ibid.* 76; *Pinnock v. Harrison*, 3 Mee. & W. 532; *Legg v. Evans*, 6 Mee. & W. 36; *British Empire Shipping Company v. Soames*, 1 E. & E. 353; *Weeks v. Goode*, 6 C. B. (N. S.) 367.

(*i*) See *Hollis v. Claridge*, 4 Taunt. 807; *Cumpston v. Haigh*, 2 Bing. N. C. 449; *Leuckhart v. Cooper*, 1 Scott, 481; *Brandão v. Barnett*, 3 C. B. 519; *Jackson v. Cummins*, 5 Mee. & W. 342; *Steadman v. Hockley*, 15 Mee. & W. 553; *Miller v. Atlee*, 3 Exch. 799; *Turner*

v. Deane, *ibid.* 836; *Turrill v. Cranley*, 13 Q. B. 197; *In re Broomhead*, 5 D. & L. 52; *Robinson v. Rutter*, 4 Ell. & Bl. 954; *Snead v. Watkins*, 1 C. B. (N. S.) 267; *Brunsdon v. Allard*, 2 Ell. & Ell. 19.

(*j*) This is one of the "Factors' Acts"—as to which, *vide sup.* p. 78.

(*k*) *Thompson v. Lacy*, 3 B. & Ald. 283; *Jones v. Osborn*, 2 Chit. Rep. 484; *Doe v. Laming*, 4 Camp. 77. But see *Dansey v. Richardson*, 3 Ell. & Bl. 144, as to a "boarding-house keeper;" and *Holder v. Soulby*, 8 C. B. (N. S.) 254, as to a "lodging-house keeper."

certain instances in which it would be obviously unjust to apply that general rule; as where the goods are stolen from the traveller's own person, or by his own servant or companion, or from a room which he occupied otherwise than as a mere guest (*l*); or where they are lost entirely through his own gross negligence (*m*);—the object of the rule being to protect travellers from the danger of loss to which they would otherwise be subject, in committing their goods to the charge of a person with whom they have had no previous dealing, and with whose character they are presumably unacquainted. However, by a recent Act, 26 & 27 Viet. c. 41, this rule of the common law is made subject to the following qualifications, viz., that no innkeeper shall be liable to make good to a guest any loss or injury to goods or property brought to his inn (not being a horse or other live animal or any gear appertaining thereto or any carriage), to a greater amount than 30*l.*,—except the goods be stolen, lost or injured through the wilful act, default or neglect of the innkeeper or his servant, or unless they have been deposited expressly for safe custody with the landlord (*n*). Another peculiarity, attached by the policy of the law to innkeepers, is, that they have no option as to the customer with whom they will deal, but are legally bound to receive and entertain every traveller who presents himself for that purpose, and is ready to pay his expenses; provided there be sufficient room in the inn, and no impropriety of conduct in the traveller himself (*o*). Nor is an innkeeper entitled to detain the person of his guest, or

(*l*) See *Burgess v. Clements*, 4 M. & S. 306; *Richmond v. Smith*, 8 Barn. & Cress. 11.

(*m*) See *Calye's case*, 8 Rep. 32; *Bennett v. Mellor*, 5 T. R. 273; *Dawson v. Chamney*, 5 Q. B. 164; *Armistead v. Wilde*, 17 Q. B. 261; *Morgan v. Ravey*, 6 H. & N. 265; *Oppenheim v. The White Lion Hotel*

Company (Limited), Law Rep., 6 C. P. 515.

(*n*) In order, however, to claim the benefit of the Act, a copy of the above provision must be conspicuously exhibited in the inn (26 & 27 Viet. c. 41, s. 3).

(*o*) *Rex v. Ivens*, 7 Car. & P. 213; *Fell v. Knight*, 8 Mee. & W. 269.

strip off his clothes, in order to secure the payment of the charges which have been incurred,—though he has a lien on any other goods brought by the defaulter into the premises (*p*).

Upon the same principle of public convenience, a *common carrier*—that is, one who professes to carry from one place to another such goods as shall be delivered to him for carriage by any person (*q*),—is answerable, by the custom of the realm, for every loss or injury to the goods so delivered, unless occasioned by the act of God, or the queen's enemies (*r*); and he is moreover bound to receive and without unreasonable delay to convey to their destination (being within the limits of his accustomed journey) the goods of every applicant who is ready to pay the price of carriage, provided he has room for them in his conveyance (*s*). But in the interests of public safety as well as those of the carrier himself, it has been recently enacted by 29 & 30 Vict. c. 69, that no carrier shall be bound to carry any goods, which within the meaning of that statute are "specially dangerous" (*t*). With regard to the liability of

(*p*) See *Sunbolf v. Alford*, 3 Mee. & W. 248; *Proctor v. Nicholson*, 7 Car. & P. 67; *Broadwood v. Granara*, 10 Exch. 417; *Snead v. Watkins*, 1 C. B. (N. S.) 267; *Allen v. Smith*, 12 C. B. (N. S.) 638.

(*q*) See *Bennett v. The Peninsular Steam Boat Company*, 6 C. B. 787.

(*r*) Co. Litt. 89; *Coggs v. Bernard*, Ld. Raym. 918. As to the liabilities of common carriers, see also the following decisions: *Macklin v. Waterhouse*, 5 Bing. 212; *Gatliffe v. Bourne*, 4 Bing. N. C. 332; *Cairns v. Robins*, 8 Mee. & W. 258; *Wild v. Pickford*, ib. 443; *Raphael v. Pickford*, 5 Man. & G. 551. See also 19 & 20 Vict. c. 60, s. 17.

(*s*) See *Batson v. Donovan*, 4 B. & Ald. 32; *Riley v. Horne*, 5 Bing. 217; *Pickford v. Grand Junction Railway Company*, 9 Dowl. 769.

(*t*) *Nitro-glycerine* (or *glonoine oil*) is alone specified in this Act as being of this class of goods. But any other article may be brought within its provisions by order in council. It may be remarked here, that "specially dangerous" goods must under this Act be so marked on delivery for carriage, under a heavy pecuniary penalty in case of default—or, at the discretion of the court, the offender may be imprisoned with or without hard labour to the extent of two years. The provisions of the Act extend to *warehouse*

a carrier for loss, it is subject (like that of the innkeeper) to exception in the case of any gross negligence in the way of packing or otherwise on the part of the owner of the goods (*u*); and it is also capable of being varied by a special contract (if any should happen to be made), relative to the terms on which goods are to be carried on any particular occasion. Accordingly, at common law, it was competent to the carrier, by a public notice of the terms on which he would deal (as by a notice that he would not be liable for goods beyond a certain value, unless booked as such, and paid for at a higher rate), to limit to a certain extent the measure of his responsibility: for upon proof—direct or presumptive (*v*),—that such notice came to the knowledge of the customer, before the goods were sent, the law would suppose a special contract between the parties conformable to the terms of the notice, though it still held the carrier responsible for negligence or wilful misconduct (*x*). And such is still the law, with respect to the liability of common carriers in any case not otherwise provided for. But it is subject to certain modifications, which have been made by statute, which may be stated as follows.

First, as to carriers *by land*, it has been provided, that no public notice shall limit or in anywise affect their liability as existing at common law, for any goods in respect whereof they shall not be entitled to protection under the Carriers Act (*y*); but that they shall, on the other hand,

owners as well as carriers, and carriers under it are those who convey either passengers or goods. As to *nitro-glycerine*, a subsequent Act (32 & 33 Vict. c. 113) prohibits its importation or carriage altogether, unless by the special licence of a secretary of state.

(*u*) See *Robinson v. Dunmore*, 2

Bos. & Pul. 419.

(*v*) *Davis v. Willan*, 2 Stark. R. 279; *Mayhew v. Eames*, 3 Barn. & Cress. 604.

(*x*) See *Nicholson v. Willan*, 5 East, 507; *Garnett v. Willan*, 5 B. & Ald. 61; *Riley v. Horne*, 5 Bing. 223.

(*y*) 11 Geo. 4 & 1 Will. 4, c. 68.

enjoy a limited protection under that Act with respect to certain classes of goods; it being enacted that no such carrier shall be liable for loss or injury to gold or silver coin, jewellery, engravings, and a variety of other articles specified in the Act (*z*), *when the aggregate value of the parcel shall exceed ten pounds*, unless at the time of delivery the value and nature thereof shall have been declared, and such increased charge paid thereon, as by a legible notice affixed in the office of the carrier shall have been previously advertised to the public (*a*). But if no such notice shall have been affixed, or any increased charge demanded on the value being declared (*b*), or if the carrier shall refuse (on being paid the increased charge) to give a receipt acknowledging the parcel to be insured, he shall not be entitled to the benefit of the statute, but shall remain liable as at common law (*c*). And there is besides a proviso, that nothing in the Act contained shall affect any *special* contract between the carrier and customer; or shall protect the carrier, in any case, from loss arising from the *felonious* acts of any servant in his employ (*d*); or shall protect any such servant himself from liability for loss occasioned by his own personal neglect or misconduct (*e*).

(*z*) See also 28 & 29 Vict. c. 94.

(*a*) See *Mayhew v. Nelson*, 6 C. P. 59; *Syms v. Chapman*, 5 Ad. & E. 642; *Hearn v. L. and S. W. Railway Company*, 10 Exch. 800; *Bernstein v. Baxendale*, 6 C. B. (N. S.) 251.

(*b*) See *Behrens v. The Great Northern Railway Company*, 6 H. & N. 366; 7 H. & N. 950.

(*c*) 11 Geo. 4 & 1 Will. 4, c. 68, sects. 1, 2, 3.

(*d*) See *Boyce v. Chapman*, 2 Bing. N. C. 222; *Metcalf v. The London and Brighton Railway*

Company, 4 C. B. (N. S.) 307.

(*e*) 11 Geo. 4 & 1 Will. 4, c. 68, ss. 6, 8. It may be here observed, that the liability of *railway companies* on the carriage of goods is the same (except as varied by any enactment of a special kind) with that of other carriers. (See 8 & 9 Vict. c. 20, ss. 86, 89; 17 & 18 Vict. c. 31; and 31 & 32 Vict. c. 119.) And the case is the same as to *canal and navigation companies*. (See 8 & 9 Vict. c. 42, and 17 & 18 Vict. c. 31.) Companies of either description are, by 17 & 18 Vict. c. 31,

Next, as to the case of a conveyance *by sea*, it is to be observed, that the liability of a ship-owner—though he is in contemplation of law a common carrier, if the ship be ordinarily hired to carry goods—does not usually rest on the common law rule, but on a special contract created between the parties by the bill of lading or charterparty, which usually attends a shipment of goods (*f*); and such contract is commonly framed so as to exempt him from losses occasioned by the act of God, or of the queen's enemies, or by the perils of the seas (*g*). Moreover, by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), no owner of any sea-going ship, or of any share therein, shall be liable to make good any loss or damage, occurring without his actual fault or privity, to goods or things on board, by reason of fire on board; or to any gold, silver, diamonds, watches, jewels, or precious stones, occasioned by robbery or embezzlement,—unless the true nature and value of such articles have been inserted in the bill of lading, or otherwise declared in writing to the master or owner (*h*). And by 25 & 26 Vict. c. 63, s. 54, the owner shall not (where loss or damage occurs without his actual fault or privity) be answerable in damages to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage (*i*).

expressly prevented from limiting their liability as to the receipt, forwarding and delivery of goods, unless by *reasonable* conditions, set out in a written contract, signed by or on behalf of the consignor;—the judge before whom the special contract is pleaded by the company, having to determine whether the condition relied upon is a reasonable one or not. (See *Peck v. The North Staffordshire Railway*, 10 H. L. 473.) The cases on the liability of railway companies as carriers, are too numerous to be conveniently collected

into a note.

(*f*) See *Morse v. Slue*, 2 Lev. 69; 1 Vent. 190; *Dale v. Hall*, 1 Wils. 281, 282; *Laveroni v. Drury*, 8 Exch. 166; *Shand v. Peninsular and Oriental Company*, 3 Moore, P. C. (N. S.) 272.

(*g*) *Abbott on Shipping*, 218, 3rd edit. And see *De Rothschild v. Royal Mail Steam Packet Company*, 7 Exch. 734.

(*h*) 17 & 18 Vict. c. 104, s. 503.

(*i*) See *The Amalia*, 32 L. J. Rep., Adm. 191.

III. *The contract of the loan of money.*

This differs from the contract of bailment (as above defined) inasmuch as the money which forms its subject is not to be re-delivered to the lender, or disposed of according to his direction, but to be applied to the use of the borrower; the latter yielding afterwards to the lender an equal sum by way of payment. And in addition to this equivalent, there is commonly also yielded an increase, by way of compensation for the use of the sum advanced, which increase is called *interest*, but, when taken to greater amount than allowed by the law, has also been denominated *usury*. [In former times, indeed, many good and learned men were enemies, from doubts about its legality *in foro conscientiae*, to any increase of money by way of interest—an hostility which they grounded as well on the prohibition of it by the law of Moses among the Jews, as also upon what is laid down by Aristotle, that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase (*k*). Hence the school divines branded the practice of taking interest, as being contrary to the divine law, both natural and revealed; and the canon law proscribed the taking any the least increase for the loan of money as a mortal sin (*l*).

The practice of taking interest upon loans has nevertheless in general been sanctioned by the legislators both of antient and of modern times; and the scruples which once existed on this subject have been of late entirely disregarded; though in most communities there has not the less prevailed a sense of the expediency of restraining the exorbitancy of interest by force of positive enactment. And different nations have at different times established different rates of interest. The Romans at one time

(*k*) Polit. l. 1, c. 10. This passage has been suspected to be spurious.

(*l*) Decretal. l. 5, tit. 19.

[allowed *centesimæ*, 1*l.* per cent. monthly, or 12*l.* per cent. per annum, to be taken for common loans; but Justinian reduced it to *trientes*, or one-third of the *as* or *centesimæ*,—that is, 4*l.* per cent., but allowed higher interest to be taken of merchants, because the hazard was greater(*m*). So too Grotius informs us, that in Holland the rate of interest was in his day 8*l.* per cent. in common loans, but 12*l.* to merchants(*n*). And Lord Bacon was desirous of introducing a similar policy in England(*o*), where the law (as elsewhere) limited in general the amount of interest, and prohibited usury, but (contrary to the practice in some countries) established one rate of allowable interest in all cases alike. This rate varied indeed from time to time considerably, according as the quantity of specie in the kingdom increased, by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9, confined interest to 10*l.* per cent., and so did the statute 13 Eliz. c. 8. But as through the encouragement given in her reign to commerce the nation grew more wealthy, so under her successor, the statute 21 Jac. I. c. 17, reduced it to 8*l.* per cent., and the statute 12 Car. II. c. 13, to 6*l.*] And, lastly, by the statute 12 Ann. st. 2, c. 16, it was brought down to 5*l.* per cent. yearly; which was the extreme amount of legal interest that, until the change in the law upon this subject which is about to be mentioned, could be taken upon an

(*m*) Cod. 4, 32, 36; Nov. 33, 34, 35. 12*l.* per cent. per annum was the legal rate towards the close of the republic. Under the Twelve Tables the *fœnus unciarium* was allowed, and such uncial interest is usually supposed to have been equivalent to 8 $\frac{1}{3}$ *l.* per cent. per annum. But Niebuhr suggests that the year in respect of which it was calculated consisted of *ten* months, which would bring the rate to 10*l.* per

cent. per annum of twelve months (Niebuhr, *Rom. Geschichte*, vol. ii. pp. 431—439). Justinian regulated the scale thus—for persons of illustrious rank 4*l.* per cent., for ordinary persons 6*l.* per cent., for merchants 8*l.* per cent.; to cover maritime risks as far as 12*l.* per cent. was permitted (Maynz. s. 266. See Lord Mackenzie, p. 196).

(*n*) De Jure B. et P. l. 2, 12, 22.

(*o*) Essays, c. 41.

English contract, in any case to which the rules against usury applied.

There were extensive classes of transactions, however, in which the amount of interest was subject, (even before the change above alluded to took place,) to no restriction whatever. Among these, the first which may be mentioned were those in which the contract bearing interest was made in a foreign country; in which cases our courts would direct the payment of interest according to the law of that country in which the contract was made (*p*): and, secondly, that class of cases in which the right to recover the money lent is, by the terms of the loan put in jeopardy. This kind of hazard is obviously distinguishable from the ordinary risk of the insolvency of the borrower, which was compensated by our law, in the allowance which it made of legal interest: but the former it did not attempt to appreciate—and wherever this sort of hazard *bonâ fide* existed, the transaction always stood clear of the enactments against usury (*q*). This principle it may be desirable to illustrate in two instances, the first being that of *bottomry* or *respondentia*; the second, that of *annuities upon lives*.

[And first, *bottomry* is in the nature of a mortgage of a ship (*r*), when the owner takes up money to enable him to carry on his voyage; and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repayment (*s*). In which case it is understood, that, if the ship be lost, the lender loses also his whole money (*t*); but if it returns in safety, then he shall receive back his principal, and also

(*p*) 1 Eq. Ca. Ab. 289; *Ekins v. East India Company*, 1 P. Wms. 395.

(*q*) *Morse v. Wilson*, 4 T. R. 356; *Mason v. Abdy*, Carth. 67.

(*r*) This is said by Blackstone (vol. ii. p. 457) to have originally arisen from permitting the master of a ship, in a foreign country, to

hypothecate or pledge the ship, in order to raise money to refit.

(*s*) As to the contract of *bottomry*, see *Busk v. Fearon*, 4 East, 319; *Simonds v. Hodgson*, 6 Bing. 114; reversed in error, 3 B. & Adol. 50; *The Lord Cochrane*, 2 Rob. 320.

(*t*) *Thompson v. Royal Exchange Company*, 1 M. & S. 31.

[the premium or interest agreed upon. And this, whatever the amount of such premium or interest, has always been allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender (*u*). And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed not on the ship and goods only, but on the mere hazard of the voyage itself,—as when a man lends a merchant 1,000*l.*, to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed (*x*); and this kind of agreement is sometimes called *fœnus nauticum*, and sometimes *usura maritima* (*y*).

Secondly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed, together with interest for so much of the principal as annually remains unpaid; and an ad-

(*u*) Moll. de Jur. Mar. 361; Malyne, Lex Mercat. b. 1, c. 31; Bacon's Essays, c. 41; Simonds v. Hodgson, 3 B. & Adol. 57.

(*x*) 1 Sid. 27.

(*y*) Molloy, *ibid.*; Malyne, *ibid.* By 19 Geo. 2, c. 37, certain restric-

tions were placed on transactions by way of bottomry or at *respondentia* in regard to vessels bound to or from the *East Indies*, but the provisions on this subject contained in that Act are now repealed (see 30 & 31 Vict. c. 59).

[ditional compensation for the extraordinary hazard run of losing that principal entirely, by the contingency of the borrower's death; all which considerations, being calculated and blended together, will constitute the just proportion, or *quantum* of the annuity which ought to be granted.] But as the right to recover the principal is put in jeopardy, a transaction of this kind (however high might be the amount of annuity exacted by the lender, in proportion to the sum advanced) was never considered, at least in our own times, as an usurious bargain (z). Nor has it ever been deemed of that character, though the life of the borrower be insured (as is an usual practice) at some insurance office for the benefit of the lender, and the amount of the annuity be so adjusted as to cover the expense of such insurance; nor though the borrower himself agree to insure his own life, at his own expense, for the benefit of the lender; though by such arrangements the latter is indirectly protected (supposing the office to be solvent and the assurance kept on foot) from all danger of losing the sum advanced (a).

To subject transactions of this kind however (as being often of a very improvident nature) to some restraint, it was at one time thought expedient to require the particulars of every grant of a life annuity to be enrolled in the Court of Chancery within thirty days after its execution, and that otherwise the security should be null and void (b). The statutes, however, by which this subject was previously regulated have been now repealed (c);

(z) See *Lawley v. Hooper*, 3 Atk. 280; *Low v. Barchard*, 8 Ves. 133; *Murray v. Harding*, Black. Rep. 859; *Burdon v. Browning*, 1 Taunt. 522; *Morris v. Jones*, 2 Barn. & Cress. 232; *Holland v. Pelham*, 1 Tyr. 438; *Ex parte Naish*, 7 Bing. 150.

(a) See *Downes v. Green*, 12 Mee. & W. 481; *Hawkins v. Bennet*, 7

C. B. (N. S.) 553.

(b) See *Turner v. Browne*, 3 C. B. 157; *Molton v. Camroux*, 4 Exch. 17; *Humphreys v. Jenkinson*, 8 Exch. 684; *Evatt v. Hunt*, 2 Ell. & Bl. 374; *Doe d. Church v. Pontifex*, 9 C. B. 229.

(c) The Acts referred to in the text are the 53 Geo. 3, c. 141; 3 Geo. 4, c. 92, and 7 Geo. 4, c. 75, which

while, on the other hand, in order that it may be ascertained by search, what life annuities or rent-charges may have been charged upon lands by their owners, it has been enacted by 18 & 19 Vict. c. 15, ss. 12, 14, that any annuity or rent-charge granted after the passing of that Act, (and not given by marriage settlement or by will,) for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, shall not affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, until a memorandum containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the date of the instrument whereby the annuity or rent-charge is granted, and the amount of the annual sum to be paid, shall be left with the senior master of the Common Pleas at Westminster; who shall forthwith enter the particulars aforesaid in a book in alphabetical order, with the name of the person whose estate is intended to be affected by the annuity or rent-charge, together with the year and the day of the month when every such memorandum or minute is so left with him. But to return to the doctrine of interest upon loans.

During the course of the present and of the preceding reign, many statutes were passed, progressively mitigating or narrowing the operation of the laws against usury (*d*). This gradual relaxation was due to the diffusion of new opinions with respect to the policy on which the former system was founded. Its defence had in modern times always chiefly rested on the apparent necessity of protecting the needy and improvident from extortion; an abuse

were all repealed by 17 & 18 Vict. c. 90.

(*d*) These are 3 & 4 Will. 4, c. 98, s. 7; 5 & 6 Will. 4, c. 41; 7 Will. 4 & 1 Vict. c. 80; 2 & 3 Vict. c. 37; 3 & 4 Vict. c. 83; 4 & 5 Vict. c. 54; 6 & 7 Vict. c. 45; 8 & 9 Vict. c. 102;

13 & 14 Vict. c. 56. These had been preceded by another statute of the same general tendency, viz. 58 Geo. 3, c. 93. As to these statutes, see *Nixon v. Phillips*, 7 Exch. 188; *Fussell v. Daniel*, 10 Exch. 581; *Clack v. Sainsbury*, 11 C. B. 695.

manifestly more incident to a bargain for an advance of money, than to any other description of contract: and though the difficulty of putting an entire stop to the mischief was unquestionable, this was deemed no reason for abstaining from all attempts to check its career. On the other hand it was insisted that the laws against usury were so ineffectual to deter men from advancing money on illegal interest, and, when not actually violated, were so easily capable of being evaded, through the medium of a life annuity in connection with a life insurance, as not to be worthy of retention. It was said, moreover, that they tended to promote the very evil which they were designed to repress; inasmuch as persons who, in defiance of the law, engaged in advances of this description, found it necessary to compensate themselves for the legal peril, by insisting on a more exorbitant return for their money. And it was further maintained, that these laws imposed an inconvenient and impolitic restraint upon the price of money, which ought, like other commodities, to be allowed to find its own level in the market. Under the influence of these views, and with the object of setting free from the prohibition in question the ordinary current of commercial transactions, the statutes to which reference has just been made were successively passed; and their operation being deemed satisfactory, the total abandonment of the former policy was at length resolved upon by the legislature. This was carried into effect by the 17 & 18 Vict. c. 90; which enacts, that the several Acts mentioned in the schedule thereto annexed, and “all existing laws against usury,” shall be repealed^(e): with a proviso, however, that such repeal shall not affect the

(e) The chief of these are enumerated, sup. p. 94. It may be remarked that the schedule does not mention the 13 Geo. 3, c. 63, s. 20, by which the highest rate of legal interest to be taken on any con-

tract by any British subject in the *East Indies* is 12*l.* per cent. As to the construction of 17 & 18 Vict. c. 90, see *Hughes v. Lumley*, 4 Ell. & Bl. 274.

rights, or alter the liabilities, of any person in respect of any thing done previously to the passing of the Act; and also with a provision that, where interest was at that date payable on any contract (express or implied) to pay the legal or current rate of interest,—or where, upon any debt or sum of money, interest was then payable by any rule of law,—the same rate of interest shall be recoverable as if the statute had not been passed (*f*).

On the subject of interest it remains only to remark, that it may accrue not only upon a contract of loan, but in other cases also. For first, where a particular balance or sum of money, upon any account or consideration whatever, is admitted to be due from one party to another, a contract between them may be made—or, in the absence of express contract, may in some cases be implied by law—for the allowance of interest upon that sum, as from a certain date. But, by the general rule, no contract will arise by *implication*, for the payment of interest on money due; and the creditor is usually (in the absence of any express contract on the subject) entitled only to claim his bare principal (*g*). To this rule, however, there are certain exceptions; as in the cases of overdue bonds for the payment of money, of bills of exchange, and of promissory notes; or where there is a special usage of trade for the allowance of interest; or where the same parties have, in former accounts of the same description, claimed interest on the one side, and allowed it on the other, without objection (*h*). Interest may also be awarded at the dis-

(*f*) It may be here noticed that the repeal of the usury laws has not affected the practice of the Court of Chancery as to relieving from the consequence of his imprudence, a person who, having only just emerged from the condition of infancy, has obtained the loan of money on exorbitant and iniquitous terms. See a recent case illustrative of this doctrine,

Earl of Aylesford *v.* Morris, Law Rep., Weekly Notes, 1872, p. 224, cor. Vice-Chancellor Wickens.

(*g*) As to the case of *legacies* in the hands of the executor, vide post, chap. VII.

(*h*) See Farquhar *v.* Morris, 7 T. R. 124; Foster *v.* Weston, 6 Bing. 709; Edwards *v.* Vere, 5 Barn. & Adol. 282; Frühling *v.* Schræder, 2 Bing. N. C. 77.

cretion of the jury, on the trial of an action, by way of compensation for the non-payment of any debt of a certain and liquidated amount. For by the Act for the general amendment of the law, (3 & 4 Will. IV. c. 42,) s. 28, it is provided, "that upon all debts or sums certain (*i*), "payable at a certain time or otherwise," the jury on the trial of any issue, or on any inquisition of damages, may, "if they shall think fit, allow interest to the creditor at "a rate not exceeding the current rate of interest, from "the time when such debts or sums certain were payable, "if such debts or sums be payable by virtue of some "written instrument at a certain time; or if payable "otherwise, then from the time when demand of payment "shall have been made in writing, so as such demand "shall give notice to the debtor, that interest will be "claimed from the date of such demand, until the time "of payment" (*k*). The same statute also provides that the jury may give damages in the nature of interest, in actions for the wrongful seizure or conversion of goods, and in actions on policies of insurance; and moreover, that where, in any action personal, proceedings in error are taken by the defendant in the action, and judgment is given for the defendant in error, interest shall be allowed him for the delay thereby occasioned (*l*). And by 1 & 2 Vict. c. 110, s. 17, it has been since enacted that every judgment debt shall carry interest, at the rate of four per cent., from the time of entering up the judgment, until the same shall be satisfied, and that such interest may be levied, as well as the principal, under a writ of execution.

IV. Another contract which will require our attention

(*i*) See *Attwood v. Taylor*, 1 Man. & Gran. 279.

(*k*) See *Mowatt v. Lord Londesborough*, 4 Ell. & Bl. 1.

(*l*) See *Levy v. Langridge*, 4 Mee. & W. 337. It is apprehended that

cases in the county courts, decided without the assistance of a jury, are within the equity of the enactments of this statute with regard to the allowance of interest.

is that of *partnership*; which is where two or more persons agree to carry on any business or adventure together, upon the terms of mutual participation in its profits and losses; and this, whether they are to participate in equal shares or in any other proportion (*m*). In reference, however, to the number of partners, it is proper here to add, that where an association exceeds twenty in number, and has gain for its object, it is usually formed into a company; and that of associations of this kind it is not our purpose to speak until we arrive at a later division of the work (*n*). Of partnership then, understood as exclusive of these, we may remark, that it is commonly, though not of necessity, constituted by a written instrument; and according to the more ordinary practice, by deed; the provisions of which are usually denominated the articles of partnership. It may be dissolved, if the period of its proposed duration be indefinite, at the pleasure of either party (*o*). But if, as is more frequent, the partnership be for a term certain, it may then be dissolved either by the natural expiration of that term, or the mutual agreement of the parties; or by the decree (in the event of their disagreement) of a court of equity (*p*): and in any case the death or bankruptcy of any of the partners will amount to a dissolution of the firm (*q*). For in commercial partnerships the trade is usually carried on under a style or *firm*; by which, as by

(*m*) Per Ashurst, *Saville v. Robertson*, 4 T. R. 727; per Lord Ellenborough, *Dry v. Boswell*, 1 Camp. 330; per Tindal, C. J., *Green v. Beesley*, 2 Bing. N. C. 112; see also *Pott v. Eyton*, 3 C. B. 32.

(*n*) Vide post, bk. IV. pt. III. ch. I.

(*o*) *Peacock v. Peacock*, 16 Ves. 56.

(*p*) A suit for the dissolution or winding up of any partnership, of which the assets shall not exceed 500*l.*, may now be brought in a

county court as well as in the Court of Chancery. (28 & 29 Vict. c. 99, s. 1.)

(*q*) *Gillespie v. Hamilton*, 3 Madd. 251; *Crawshay v. Maule*, 1 Swanst. 508; 4 Burr. 2177; *Harvey v. Crickett*, 5 M. & Sel. 336. It is to be recollected here (vide sup. pp. 14, 15), that the right by *survivorship* does not obtain, with respect to the stock of *partners in trade*; this being an exception from the general rule of survivorship, which obtains in a joint tenancy.

a sort of corporate denomination, the associated body is described in all its dealings, without introduction of the particular names of its several members (*s*).

One of the most important doctrines attaching to this relation is, that the contract or other act of any member of the associated body, in matters relating to the joint concern, is, in point of law, the contract or act of the whole, and is consequently binding upon them all; and is binding in such sense as to render each member liable upon it, individually, as well as in respect of the partnership property (*t*); though on the other hand each is entitled, if sued alone, to object to the non-joinder of the other partners (*u*);—a doctrine established for the benefit of commerce, and more especially founded on the principle that each partner impliedly constitutes the other his agent, in matters relating to the business of the partnership; so that by the act of the agent his principal is bound, according to the general rule of law already explained (*x*).

This rule is in general equally applicable, though the act of the single partner should be one that, as between himself and the other members, is unwarrantable and contrary to the articles of the partnership; as where he disposes of the joint property for his own private purposes: though if the person with whom he deals is at the time aware, or has reason to suppose, that such is the character of the transaction, so that it is in the nature of a fraud as regards

(*s*) Thus the style or firm may be, *ex. gr.*, “Brown & Co.,” and such style is sometimes retained, though by changes in the partnership no member of the name of “Brown” remains any longer therein.

(*t*) As to the liabilities of members of *mining* companies, see *Ricketts v. Bennett*, 4 C. B. 686; *Brown v. Byers*, 16 Mee. & W. 252. As to the liability of members of *clubs*, see *Flemyng v. Hector*, 2

Mee. & W. 179; *Todd v. Emly*, 8 Mee. & W. 505; *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440. As to the nature of clubs generally, see *Hopkinson v. Exeter*, Law Rep., 5 Eq. Ca. 63.

(*u*) See 15 & 16 Vict. c. 76, ss. 38, 39.

(*x*) Per Tindal, C. J., *Fox v. Clifton*, 6 Bing. 795; see *Tredwen v. Bourne*, 6 Mee. & W. 461.

the other partners, it would not in such a case be binding on them (*y*).

The authority which partners thus possess to engage for each other is, however, merely an implied or presumptive one; and therefore if any one of them enter into a transaction in the name of the whole after notice expressly given by the others to the person with whom he deals, that they do not concur in the act, such dissentient partners will not be bound by it; for by this express notice their implied sanction is disproved (*z*). And the authority is also one which extends not to matters extraneous to the joint concern; nor even to matters which, though connected with it, are, by the ordinary usage of business, transacted with the express and formal intervention of each partner. Thus it is held, that one member of a firm has no implied authority to refer to private arbitration a dispute in which the partnership is involved with a stranger, and thus withdraw it from the province of the ordinary courts of law (*a*); nor has he, in any case, an implied authority to execute a deed in the name of the partnership (*b*). In both these instances, the other members of the firm must be either actual parties to the transaction, or must at least give their express consent that their single partner should act in their behalf; and in the latter case that consent must be authenticated, like the transaction itself, by deed.

A partnership may, as regards strangers or the public at large, be an actual one, though merely nominal as regards the parties themselves; for a man, who is not

(*y*) *Shirreff v. Wilks*, 1 East, 48;

Vere v. Ashly, 10 B. & C. 288;

Hawker v. Bourne, 8 Mee. & W. 710.

(*z*) *Lord Galway v. Matthew*, 10 East, 264.

(*a*) *Adams v. Bankart*, 5 Tyr. 425; *Stead v. Salt*, 3 Bing. 101; *Boyd v. Emerson*, 2 Ad. & E. 198, 199; and see *Hambidge v. De la*

Crouée, 3 C. B. 742.

(*b*) *Thomason v. Frere*, 10 East, 419. On the other hand, in the case of a trading partnership, a single partner has an implied authority to bind the firm by accepting bills drawn on it. See *Hedley v. Bainbridge*, 3 Q. B. 316; *Norton v. Seymour*, 3 C. B. 792; *Nicholls v. Diamond*, 9 Exch. 154.

really interested in the joint business or adventure, may nevertheless allow his credit to be pledged as a partner : as in the case where his name appears in the firm, or where he interferes in the management of the business, so as to produce a reasonable belief in strangers that he is a partner. In every such instance, the person so acting is answerable as an apparent or nominal partner, on the obligations of the partnership, to all who deal with the firm without having notice at the time that he is in fact a stranger to it in point of interest (*c*).

It frequently happens, on the other hand, that a partnership comprises some member or members not generally known to be interested in the business or adventure ; the firm (where there is one) not indicating the names of all the members, and the dealings being transacted by particular members only, without disclosing the names of the rest. Partners thus unknown to the public are said to be *dormant* ; and it is a general rule, that every person dealing with the other members is entitled, when he discovers the existence of such a dormant partner,—or of any partner (whether generally known to be so or not), of whom he was himself unaware at the time of the transaction,—to hold him chargeable with the rest, on the obligation which the rest had contracted. It has been even held, that where by private agreement a man is entitled to share the net profits of any business or adventure, on the terms, as between himself and his associates of being exempt from all its debts and engagements, he may, when discovered, be charged by creditors, as if he were a partner in the full and ordinary sense of the term (*d*) ; though, on the other hand, a person employed as agent in the conduct of a business or adventure, if paid for his labour by a certain

(*c*) *Waugh v. Carver*, 2 H. Bl. 235, 242, 246.

(*d*) See *Waugh v. Carver*, ubi sup.; *Cheap v. Cramond*, 4 B. & Ald. 663; *Wightman v. Townroe*,

1 Mau. & Sel. 412; *Pott v. Eyton*, 3 C. B. 32; *Barry v. Nesham*, ibid. 641; *Hickman v. Cox*, 8 H. of L. Cases, 268; *Bullen v. Sharp*, Law Rep., 1 C. P. 86.

proportion of the *gross* profits, has never been held liable, as partner, for it is a mere mode of remuneration, and the relation is not that of partners, but of principal and agent (*e*). The reason assigned for the liability of a dormant partner has been, that he, who takes a share in the profits, takes a part of a fund on which the creditors substantially rely for payment (*f*); but the doctrine must now be taken in connection with the 28 & 29 Vict. c. 86, a recent statute passed to “amend the law of partnership,” whereby it has been enacted that a loan of money to a trader, on a written contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, arising from the trade or undertaking, shall not of itself constitute the lender a partner or render him responsible as such (*g*);—that no servant or agent shall become responsible as, or acquire the rights of, a partner by contracting to be remunerated by a share in the profits (*h*);—that the widow or child of a deceased partner shall not be deemed a partner merely by the receipt of an annuity arising out of the profits of the concern (*i*);—and that a person selling the goodwill of his business, shall not be deemed a partner therein with the vendee merely by receiving the price by way of annuity or otherwise out of the profits (*k*). On the other hand, the Act contains a proviso that, in the event of the bankruptcy or insolvency of the trader, the lender of money under its provisions can only recover the principal, or profits or interest for which he has contracted, after all other creditors of the trader for valuable consideration have been first satisfied (*l*).

(*e*) *Dry v. Boswell*, 1 Camp. 329; and *Green v. Beesley*, 2 Bing. N. C. 108. See also 1 Smith’s Leading Cases, 506, where the distinction is noticed between the mode of remuneration mentioned in the text, and a remuneration out of the *net* profits.

(*f*) See the argument of Lord

Mansfield in *Hoare v. Dawes*, Doug. 371; see also *Grace v. Smith*, 2 Bl. Rep. 998.

(*g*) 28 & 29 Vict. c. 86, s. 1.

(*h*) Sect. 2.

(*i*) Sect. 3.

(*k*) Sect. 4.

(*l*) Sect. 5. By sect. 6, the word “person,” when used in the Act,

Though (subject to the provisions of the above Act) an ostensible and a dormant partner are thus in general exposed to the same liability, yet there is an important difference between them. The former, even though he retire from the partnership, continues liable, on its future engagements, to all persons who had before dealt with it, unless he have given them previous notice of the fact of his retirement; and will continue liable even on its future engagements to those who had not been previous customers, unless he has given public notice of his retirement in some efficient way, as by an advertisement in the *Gazette* (*m*). But a dormant partner is not liable, except upon contracts made while he actually continues to be interested in the joint concern.

On the subject of partnership we shall add only this remark, that the adjustment of accounts and disputes between persons standing in that relation to each other, is one of those matters for which the common law has provided no convenient remedy; and which has consequently fallen under the almost exclusive cognizance of the courts of equity. When one partner, therefore, has any claim against another in his social capacity, the ordinary course is to take proceedings in equity, to obtain an account, or such other redress as the case may require (*n*).

is to include a partnership firm, a joint stock company, and a corporation.

(*m*) See *Kirwan v. Kirwan*, 4 Tyr. 491.

(*n*) Accordingly under the Judicature Act, 1873, which comes into operation on the 2nd November, 1874, such proceedings will be assigned to the Chancery division of the High Court of Justice thereby established. (See 36 & 37 Vict. c. 66, s. 34.) It may be noticed that, where there has been an *account stated* between the partners, one has been allowed to sue the

other in a court of law. There is also the action of *account*, a form of proceeding which, after long desuetude, some attempts have been lately made to revive. (See *Willes*, 208; *Inglis v. Haigh*, 8 M. & W. 769; *Baxter v. Hosier*, 5 Bing. N. C. 288; and *Henderson v. Eason*, 17 Q. B. 701.) It may be observed, moreover, that where the assets of the partnership do not exceed 500*l.*, the county courts have now a concurrent jurisdiction with the Court of Chancery. (28 & 29 Vict. c. 99.)

V. The contract which we shall next notice, is that of *guarantee*; which is where one man contracts as surety on behalf of another, an obligation to which the latter is also liable as the proper and primary party. As if a sum of money be advanced to A., and B., his friend, joins with him in giving a bond for its repayment; or if there be an agreement to supply A. with goods to a certain amount, on credit, and B. promises to see the seller paid for all goods that shall be so supplied (*o*); or if A. be appointed a public officer, and B. joins with him in a bond, engaging that the duties of the office shall be faithfully performed.

Such contracts as these are, however, of no legal force if made by word of mouth only; for (as we have seen) by the Statute of Frauds, (29 Car. II. c. 3,) s. 4, no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized (*p*). But if so made, then by 19 & 20 Viet. c. 97, s. 3, no such promise shall be invalid to support an action or other proceeding to charge the person by whom it shall have been made, by reason only that the *consideration* for the promise does not appear either in writing or by necessary inference from a written document (*q*).

(*o*) See *Chapman v. Sutton*, 2 C. B. 634.

(*p*) Vide sup. p. 56. See the following cases under this provision: *Goodman v. Chase*, 1 B. & A. 297; *Forth v. Stanton*, 1 Wms. Sannd. 211; *Tomlinson v. Gell*, 6 Ad. & Ell. 564; *Eastwood v. Kenyon*, 11 Ad. & Ell. 446; *Walker v. Hill*, 5 H. & N. 419. In 9 Geo. 4, c. 14, s. 6, there is a like provision as to *representations* concerning the cha-

racter, ability or dealings of another, with intent that he may obtain credit.

(*q*) Prior to this statute it had been decided, that if the consideration, as well as the promise, did not appear on the face of the guarantee, the case fell within the prohibition of the Statute of Frauds (see *Wain v. Warlters*, 5 East, 10). As to the nature of the consideration which will support a guarantee,

A contract of this description is also of no effect in law, if the person giving the guarantee is at the time misled, to the knowledge of him who receives it, by any material misrepresentation of the state of accounts or transactions between the principal parties (*s*). And even where valid and effectual, it is to receive (for the benefit of the surety) a strict construction: and will not be extended (in general) to matters not falling within the precise terms of the engagement (*t*). And by 19 & 20 Vict. c. 97, s. 4, it is accordingly declared, in case of a guarantee to or for a *firm*, that (except where otherwise expressed or necessarily implied) no such guarantee shall be binding in respect of any thing done or omitted to be done, after a change in the firm shall have taken place (*u*).

The liability once attaching to a surety is, moreover, discharged, if the principal debtor be released by the creditor, or if the debt or demand for which the guarantee was given be by any means extinguished as between those parties; for the surety's obligation is collateral only, and cannot, therefore, survive the liability of the principal debtor himself (*x*). So it is discharged even if the creditor, without the surety's consent, engage to give any indulgence, in point of time, to the principal debtor; for there would otherwise be a prolongation of the surety's liability, beyond the period contemplated by the parties at the time that the guarantee was originally given (*y*).

see *Oldenshaw v. King*, 2 H. & N. 517; *Holmes v. Mitchell*, 7 C. B. (N. S.) 361.

(*s*) *Stone v. Compton*, 5 Bing. N. C. 142. But concealment without *fraud* will not vitiate the guarantee. See the *North British Insurance Company v. Lloyd*, 10 Exch. 523.

(*t*) See *Weston v. Barton*, 4 Taunt. 673; *Simson v. Cooke*, 1 Bing. 452; *University of Cambridge v. Baldwin*, 5 Mee. & W.

580; *Stewart v. McKean*, 10 Exch. 675.

(*u*) See *Leathley v. Spyer*, Law Rep., 5 C. P. 595.

(*x*) See *Lewis v. Jones*, 4 Barn. & Cress. 506; *Hall v. Hutchons*, 3 Myl. & K. 426; *Petty v. Cooke*, Law Rep., 6 Q. B. 790.

(*y*) See an elaborate discussion of this doctrine in *Pooley v. Harradine*, 7 Ell. & Bl. 431; *Frazer v. Jordan*, 8 Ell. & Bl. 303; and Tay-

The law moreover implies, in favour of the surety, a promise on the part of the principal debtor to reimburse him—as well principal as interest,—for any payment which he is obliged to make upon his guarantee (*z*). And where two or more persons have become sureties in respect of the same debt or demand (whether by the same instrument of guarantee or by different ones), any one of them who pays more than his rateable proportion is entitled to obtain contribution for such excess from the other sureties (*a*),—a right founded, it is said, not on any implied contract, but on a natural principle of justice: and one which has been recently recognized by the statute 19 & 20 Vict. c. 97, s. 5 (*b*).

To these rules, reasonably established by the law for the protection of him who guarantees another's debt, we may add, that when that debt becomes due, he may apply to a court of equity to compel his principal to pay it off, and thus to relieve him from further liability (*c*): and that where the surety is himself obliged to make the payment he is entitled to an assignment of every security which the creditor held in respect of the debt; and to stand in the place of the creditor in respect of such security, whether as against the principal debtor, or any co-surety (*d*).

The contracts on which our attention has been hitherto

for *v. Burgess*, 5 H. & N. 1. See also *Watts v. Shuttleworth*, 5 H. & N. 235.

(*z*) Vide sup. p. 57. See *Batard v. Hawes*, 2 Ell. & Bl. 287; *Petre v. Duncombe*, 2 L. M. & P. 107.

(*a*) It has been held, however, as an exception to this general rule, that a surety who has paid more than his share, cannot recover contribution from any co-surety who became such *at his request*. (*Turner v. Davies*, 2 Esp. 478.) The rule stated in the text prevails where one of *several joint debtors* has

paid the entire debt. (*Batchelor v. Lawrence*, 9 C. B. (N. S.) 543.) As to the rights of a surety, see also *Cooper v. Evans*, Law Rep., 4 Eq. Ca. 45.

(*b*) See *Reynolds v. Wheeler*, 10 C. B. (N. S.) 561.

(*c*) *Antrobus v. Davidson*, 3 Mer. 579.

(*d*) 19 & 20 Vict. c. 97, s. 5. As to this provision see *Copis v. Middleton*, 1 Turn. & Russ. 224; and *Wodehouse v. Farebrother*, 5 Ell. & Bl. 277.

bestowed are characterized rather by their subject-matter, than their form: but those which we shall hereafter consider are of forms more fixed and determinate; and are also distinguished from those already described as being, by their very nature and definition, written instruments. Among these, the first notice is due to

VI. *Bonds (or writings obligatory)*,—which are a kind of contract in very extensive use, being adopted in a great variety of cases where the object is that there shall be security for the payment of money, or the performance or non-performance of any other act; a bond being an instrument under seal, whereby the party from whom the security is intended to be taken obliges himself to pay a certain sum of money to another at a day specified (*f*). If this be all, the bond is called a *single* one (*simplex obligatio*), but there is generally, indeed, in practice invariably, a condition added, that if the obligor does, or abstains from doing, some particular act, the obligation shall be void, or else shall remain in full force; and the sum mentioned in the obligatory part of the bond is in the nature of a *penal sum* (or *penalty*), and is usually fixed at much more than sufficient to cover any possible damage arising from a breach of the condition in respect of the act therein mentioned. The nature of this act depends upon the particular object intended to be secured. [Thus it may be the repayment (with interest) of a principal sum borrowed of the obligee; the periodical payment to him of an annuity; or the faithful

(*f*) There is a species of bond much in use in commercial transactions known as “Lloyd’s bonds.” It may be worth explaining that these are instruments under the seal of a company admitting the indebtedness of the company to a specified amount to the obligee, with a covenant to pay him such amount with interest on a future day. As to

these bonds, see *Chambers v. Manchester, &c. Railway*, 5 B. & Sm. 288; *White v. Carmarthen Railway*, 1 Hem. & G. 786; *Blackmore v. Yates*, Law Rep., 2 Ex. 225; *Watson v. Mid Wales Railway Company*, ib., 2 C. P. 593; *Dickson v. Swansea Vale Company*, ib., 4 Q. B. 44; *In re Cork and Youghall Railway Company*, ib., 4 Chan. App. 748.

[performance, by a third person, of the duties of an office held under the obligee. In case the condition is not performed, the bond becomes forfeited or absolute at law; and charges the obligor, while living, and, after his death, his executor, or administrator,—and (subject to distinctions explained in a former part of this work) is also capable of being enforced against his heir or devisee (*g*).

If the condition of a bond be impossible at the time of making it, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released (*h*).] On the other hand, if the condition be to do a thing that is either illegal at common law, or contrary to the provision of an act of parliament, the whole bond is void (*i*); for it is an unlawful contract, and the obligee shall take no advantage of such a transaction. And the effect will be the same even though the condition be *ex facie* legal, if the bond was in reality given upon an illegal consideration; or if it be to effect an unlawful object which the condition does not disclose, or attempts by its language to conceal: for though, by the general rule of law, the parties to any deed are in general *estopped* from contradicting it, or assigning to it any intent beyond that which appears on the instrument itself (*k*), yet an exception is permitted in this case, upon the obvious ground of public policy (*l*). But if a bond have several conditions, some legal and the others illegal—and of a nature entirely dis-

(*g*) Vide sup. vol. I. pp. 432, 433.

(*h*) *Campbell v. French*, 6 T. R. 211; see *Duvergier v. Fellowes*, 5 Bing. 256.

(*i*) 1 Saund. by Pat. & Will. 66 a, n. (1). Blackstone (vol. ii. p. 348) makes a distinction, not recognized by the modern authorities, between the case where the condition is "*malum in se*," and where it is

"*contrary to some rule of law that is merely positive*;" considering the bond as void in the first case, but in the second, single. (See also *Co. Litt.* 206 b.)

(*k*) Vide sup. vol. I. p. 482.

(*l*) *Collins v. Blantern*, 2 Wils. 341; *Paxton v. Popham*, 2 East, 421.

tinet, and not dependent upon each other—the general rule then is, that the latter conditions only shall be avoided; and that the bond shall continue nevertheless in force, and be subject to the remaining or valid conditions (*m*). Such appears to be the state of the law, with respect to conditions impossible or illegal at the time when the bond is executed. But if the condition be then possible and legal, and afterwards become impossible by the act of God, or that of the obligee himself—or if it shall become by any means illegal—the penalty of the obligation is in any of these cases saved, and the obligor discharged from all liability; for no prudence or foresight on his part could guard against such a contingency (*n*).

On the forfeiture of the bond, the whole *penalty* was formerly recoverable at law; but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, viz., his principal, interest and expenses (*o*),—or, supposing the breach not to consist in the mere failure to pay money, the amount of damage actually sustained thereby. And, with respect to money bonds, this principle of equity was in course of time introduced even into the practice of the courts of law (*p*). In confirmation of which, it was enacted, by 4 & 5 Anne, c. 16, with respect to bonds of this description, that the bringing into court of the principal sum due, with interest and costs, should be a full satisfaction and discharge in a court of law, even after action commenced; and further that such a bond should not be forfeited by a mere non-payment at

(*m*) 1 Saund. by Pat. & Will. 66 a, n. (1), n. (d); see *Green v. Price*, 13 Mee. & W. 695.

(*n*) Co. Litt. 206 a; Bro. Ab. tit. Condition, pl. 127; *Eaton v. Butter*, W. Jon. 180; 2 Bl. Com. 341. In Co. Litt. ubi sup. the distinction is made between conditions of *bonds* and conditions annexed to an *estate*; as to which last, it is laid down,

that if they become impossible the estate is absolute. As to such conditions, see also Co. Litt. 209 a; Shep. Touch. 157; et sup. vol. I. p. 302.

(*o*) 2 Bl. Com. 341.

(*p*) Ibid., and see *Stern v. Vanburgh*, 2 Keb. 553, 555; *Anon.*, 6 Mod. 11; *Burridge v. Fortescue*, ibid. 60; *Ireland's case*, ibid. 101.

the precise day mentioned in the condition ; but that if payment should be made before or even after the day, it might be pleaded as a good bar to any action afterwards brought on the instrument(*q*). An improvement founded on the same general principle has been also introduced with respect to bonds whereof the conditions refer to *other* acts, not consisting in the simple payment of money on a day certain. For it was enacted by 8 & 9 Will. III. c. 11, (and the provisions on this subject have been expressly recognized and preserved by the 15 & 16 Vict. c. 76, known as the Common Law Procedure Act, 1852,) that, when an action at law is brought upon an instrument of this description, a jury shall always inquire of the damages which the plaintiff has actually sustained by breach of the condition ; and though (for his better security in the event of any future breach) he may still enter up *judgment* for the penalty, as at common law, yet he cannot take out *execution* to a larger amount than the damages* which the jury shall assess (*r*).

This subject being nearly related to the general one of *contracts secured by penalties*, we shall take occasion, though at the expense of some digression, to advert to some of the learning connected with that topic.

In contracts not framed as bonds, (for to bonds we do not now refer,) it often happens, that, in connection with a covenant or promise that one of the parties shall perform or shall abstain from doing a certain act, the same instrument provides that he shall pay to the other a sum of large amount, in the event of such covenant or promise being broken : and the question frequently arises, whether

(*q*) As to the construction of this statute, see *Robinson v. Brown*, 3 C. B. 54.

(*r*) 15 & 16 Vict. c. 76, s. 96. On this subject, see *Saund. by Pat.* & Will. 58 b ; 2 *ibid.* 187 a ; *Smith v. Bond*, 10 Bing. 125 ; *Ethersey v.*

Jackson, 8 T. R. 255 ; *Homfray v. Rigby*, 5 Mau. & Sel. 60 ; *James v. Thomas*, 5 Barn. & Adol. 40 ; *Archbishop of Canterbury v. Robertson*, 3 Tyr. 390 ; *Kepp v. Wiggett*, 4 C. B. 678 ; *Bishop of London v. McNeil*, 9 Exch. 490.

this sum should be considered as a penalty, or as the liquidated amount of damage which, in such an event, the injured party shall be taken to have really sustained. And the distinction is important; for if the sum is to be taken in the former light, then the party who complains of the breach of the agreement, on bringing his action and proving the breach alleged, is compelled by the statute of William the third, just mentioned (which applies to this case as well as to a bond), to limit his *execution* to the amount of damages which a jury shall assess upon the evidence laid before them; though he may sign judgment for the whole amount of the penalty, for his better security for the future (*r*). On the other hand, where the case is considered as one of liquidated damages, the effect is to entitle the plaintiff, on proving a breach, to an award both of judgment and execution for the sum so agreed upon: the settlement of its amount by the parties themselves superseding the exercise of any discretion by the jury.

The question, whether, in any particular case, a given sum shall fall under one of these predicaments or the other, depends partly upon the meaning of the parties themselves, as apparent on the face of the contract; partly on that principle of equity infused into the law, by the effect of the statutes already mentioned, by which a party is prevented from recovering more than he is conscientiously entitled to claim. If the sum was intended by the contractors themselves as penalty, the law also will always assign to it the same character; and there can be no doubt (in general) that such is their intention, where the word “penalty” is introduced (*s*). And even where their own design was to stipulate for liquidated damages, yet if the sum they specify appear to be substantially, and in its essential nature, a penalty, the law will insist on its being

(*r*) See also 15 & 16 Vict. c. 76, s. 96, which (as the previous enactments of 8 & 9 Will. 3, c. 11) applies to contracts secured by penalties as

well as to bonds.

(*s*) *Smith v. Dickenson*, 3 Bos. & Pul. 630.

so construed, in order to restrain the plaintiff's execution to a reasonable amount (*t*). In illustration of which latter principle it may be remarked, that where the agreement is to pay a certain sum of money, with a further proviso for payment of a larger sum, far exceeding what could be due for interest, in case of default, the larger sum will be treated as penalty, even though the parties have described it as stipulated damages; because it is clearly not, in such a case, the natural measure of compensation: and upon the same principle, where a contract contains a variety of distinct stipulations involving *inter alia* the payment of money to a fixed amount, and provides for payment of a larger sum upon breach of any one of the stipulations, that sum will also rank, in legal contemplation, as a penalty (*u*). But on the other hand, there are cases in which reason and justice are felt to require an opposite construction; provided the language of the parties is consistent with the supposition that they intended the sum specified to be taken as the real measure of damages. Thus where a man engaged with a woman to marry nobody but her, and on marrying with any other to pay her 1000*l.*, she was held entitled, on breach of this engagement, to judgment and execution for the entire sum, supposing the action to be maintainable at all: but the contract was ultimately adjudged to be illegal, as in restraint of marriage, and not capable of being enforced (*x*). So where on the dissolution of a partnership between attorneys, one of the parties covenanted with the other not to carry on the business of an attorney within fifty miles from a place named, nor to interfere with the clients of the late partnership, and on infringement of that covenant to pay 1000*l.* for liquidated damages, and not by way of penalty—here, the intention of the parties being clear, the sum specified was held to

(*t*) See *Astley v. Weldon*, 2 Bos. & Pul. 346; *Reindel v. Schell*, 4 C. B. (N. S.) 97, 118.

(*u*) See *Atkyns v. Kinnier*, 4 Exch. 776.

(*x*) *Lowe v. Peers*, 4 Burr. 2225.

be the true measure of damages, and to be recoverable as such (*y*).

VII. We shall next advert to *bills of exchange* and *promissory notes*, being two species of mercantile instruments, in writing (without seal), by either of which men enter into engagement for the payment of money. And we shall treat of them severally, and in their order; though there is so little difference in principle between a bill and a note, that, when the nature and properties of the former are well understood, the latter will require but a very brief notice.

1. [First, then, a *bill of exchange*—which is a security originally invented among merchants in different countries, for the more easy remittance of money from one to the other, and has since spread itself into almost all pecuniary transactions,—may be defined as an open letter of request from one man to another, desiring him to pay a sum named therein to a third person, on his account (*z*); and by this method a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, 1000*l.*; now if C. be going from England to Jamaica, he may pay B. the 1000*l.*, and take a bill of exchange drawn by B. in England, upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C., who carries over the money in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices, in order more easily to draw their effects out of France and England, into those

(*y*) *Galsworthy v. Strutt*, 1 Exch. 659. See also *Sainter v. Ferguson*, 7 C. B. 716; *Mercer v. Irving*, Ell. Bl. & Ell. 563; *Betts v. Bunch*, 4

H. & N. 506; *Carnes v. Nesbitt*, 7 H. & N. 778.

(*z*) See *Davis v. Clarke*, 6 Q. B. 16; *Peto v. Reynolds*, 9 Exch. 410.

[countries in which they had chosen to reside. But the invention of it was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England in 1290 (*a*); and in 1236, the use of paper credit was introduced into the Mogul empire in China (*b*). In common speech, such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal, as well as mercantile expression. The person, however, who writes this letter is called in law the *drawer*, and he to whom it is written, the *drawee*; and the third person, to whom it is payable, is called the *payee*.]

These bills are either *inland* or *foreign*. An inland bill is one drawn in any part of the united kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them (being part of the dominions of her Majesty), and made payable in, or drawn upon any person resident in, any part of the said united kingdom or islands (*c*). A foreign bill is one drawn by a person residing abroad upon some person in England, or *vice versâ*. [Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by 9 & 10 Will. III. c. 17, and 3 & 4 Anne, c. 9,—made perpetual by 7 Anne, c. 25 (*d*)—inland bills of exchange are put upon the same footing as foreign ones; what was

(*a*) 2 Carte, Hist. Eng. 203—206.

(*b*) Mod. Un. Hist. iv. 499. Bills of exchange are said to have been known to the antients; see Park, Ins. Introd. xix. n. (b), 7th edit.

(*c*) This is enacted by 19 & 20 Vict. c. 97, s. 7; and the enactment is so worded as to apply both to bills of exchange and promissory notes, though the latter have never before been considered as subject to the distinction of inland and foreign. Formerly a bill drawn or payable

in *Scotland or Ireland* was foreign: but it is now made an inland one by the effect of the statute just mentioned. It is to be observed, however, that the statute has a proviso “that nothing contained in the “above provisions shall alter or “affect the *stamp duty*, if any, “which, but for that enactment, “would be payable in respect of “any such bill or note.”

(*d*) See also 19 & 20 Vict. c. 97, s. 6.

[the law and custom of merchants with regard to the one, and taken notice of merely as such, being by those statutes expressly enacted with regard to the other: so that now there is, in law, no substantial difference between them (*e*).]

If a bill be made payable (as is most usually the case) *to order*, that is, either to A. B. *or his order*, or merely *to the order of* A. B. (which is in all respects equivalent), it is said to be *negotiable* (*f*):—a term applied, in law, to any instrument, the right of action on which is, by exception from the common rule, freely assignable from man to man (*g*);—and the payee may, by indorsement, that is, by writing his name on the back of the bill, assign over his interest therein. Such indorsement may either be in *blank* or in *full*. In the former case, the payee simply writes his own name; in the latter, he also names the intended assignee, as the person to receive payment; and to the intended assignee, in either case, he delivers over the bill so indorsed (*h*): and such assignee (or *indorsee* as he is called) may indorse in like manner to another, and so on *in infinitum* (*i*). If the bill be payable (as it may be) simply to a person named, and not to order, it is not negotiable; and on the other hand, if made payable to *bearer*,—as is usually the case in that species of bill called

(*e*) An inland bill, however, differs from a foreign one in respect of the *protest* upon dishonour; which in the case of the latter is necessary, but of the former is not (vide post, p. 121). There is a difference also between them in the regulations as to *stamps*. (See 17 & 18 Vict. c. 83, and 33 & 34 Vict. c. 97.)

(*f*) Bayley on Bills, 31, 5th edit.; Plimley v. Westley, 2 Bing. N. C. 249.

(*g*) Vide sup. p. 46. It is to be observed, that, though certain instruments of modern introduction, such as dock warrants, delivery war-

rants, and the like, are commonly described as *negotiable*, they are not strictly so. (See Kingsford v. Merry, 1 H. & N. 503.)

(*h*) As to the necessity that the bill should be delivered, see Bromage v. Lloyd, 1 Exch. 32; Emmett v. Tottenham, 8 Exch. 884.

(*i*) An indorsement may take place even after the bill is due. But in that case, the indorsee is deemed to take the same subject to all objections or exceptions to which it was subject in the hands of the indorser. Banks v. Colwell, 3 T. R. 81; Brown v. Turner, 7 T. R. 630; and see 19 & 20 Vict. c. 60, s. 16.

a *cheque on a banker* (*k*),—it is negotiable without any indorsement, and by mere delivery. And the case is the same where a bill, payable to order, is indorsed in *blank* by the payee; for it may afterwards be transferred either by a new indorsement and delivery, or by simply delivering it to the intended transferee.

When the time arrives at which a bill is intended to be payable, it is said to be *due*, or *at maturity* (*l*). At any time before it becomes due, the person who possesses or is the holder of it—whether as payee or transferee—may *present* it (that is, carry and show it) to the drawee, for his *acceptance*. This it is in his option either to give or to refuse; and we will first suppose him to take the former course.

An acceptance (as to the manner of it) must be in writing on the instrument: it being provided by 19 & 20 Vict. c. 97, s. 6, that no acceptance of any bill of exchange, whether inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill; or, if there be more than one part of such

(*k*) As to the distinction between a cheque and an ordinary bill, see *Hewitt v. Kaye*, Law Rep., 6 Eq. Ca. 200. By 19 & 20 Vict. c. 25, and 21 & 22 Vict. c. 79—passed in consequence of doubts having arisen as to the obligations of bankers with respect to what are commonly called *crossed* cheques (as to which instruments, see *Carlton v. Ireland*, 5 Ell. & Bl. 765; *Simmons v. Taylor*, 4 C. B. (N. S.) 463)—it is enacted, 1, that in every case where a cheque or draft on any banker, (made payable to bearer or to order on demand,) bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words “and company” in full or abbreviated—the banker on whom it is drawn shall not pay such cheque or draft to any other than the banker

whose name is crossed; or if crossed, but without a banker’s name, to any other than a banker; and 2, that in the construction of the Acts the word “banker” shall include any person or persons, or corporation, or joint stock, or other company acting as a banker or bankers.

(*l*) Until recently, though a bill drawn payable *on demand* became due on the day expressed on the face of it for payment, other bills were allowed by the “custom of merchants” three additional days, termed *days of grace*; but by 34 & 35 Vict. c. 74 (The Bills of Exchange Act, 1871), this distinction was abolished, and bills drawn payable “at sight,” or “on presentation,” are assimilated in stamps and all other particulars, to those drawn payable “on demand.”

bill, on one of the said parts; and that it must, moreover, be signed by the acceptor or by some person duly authorized by him. The bill may also be either accepted simply (without specifying where it will be paid), or it may be accepted *specialty*, that is, as payable at some specified place, “and not elsewhere.” But an acceptance at a banker’s, without such restrictive words as just mentioned, is not a special acceptance, nor has it the effect of making the bill payable at such banker’s *only*,—such a mode of acceptance being merely for the convenience of the drawee, and in no respect qualifying his liability (*n*). After acceptance, any person, who, as payee, or by transfer (whether before or after acceptance), is the holder of the bill at its maturity, is entitled to immediate payment of the amount for which it is drawn, upon *presenting* it to the acceptor,—or in case of a special acceptance, at the place where he has made it payable (*o*)—for *payment*, and being ready to deliver it up on payment being made (*p*): and, if under such circumstances the money be not then paid, has a right to bring an action against the acceptor for the amount (*q*). But the holder is, in that case, also entitled to have recourse to the drawer; and to every

(*n*) 1 & 2 Geo. 4, c. 78, s. 1. See *Turner v. Hayden*, 4 Barn. & Cress. 1; *Halsted v. Shelton*, 5 Q. B. 86; *Burchfield v. Moore*, 3 Ell. & Bl. 683.

(*o*) *De Bergareche v. Pillin*, 3 Bing. 476.

(*p*) *Hansard v. Robinson*, 7 B. & C. 90; *Ramulz v. Crowe*, 1 Exch. 167.

(*q*) It may be here observed, that by 18 & 19 Vict. c. 67 (extended to the county courts by Order in Council, 30 January, 1856, in cases where the sum claimed does not exceed 50*l.*), passed “to facilitate the remedies on bills and notes, by the prevention of frivolous or fictitious defences,” the defendant, in

any action on a bill or note commenced within six months after it has become due and payable, is prohibited from defending the action, unless he obtains leave to do so from the court. And this leave (as a general rule) will only be granted where he pays the money into court, or shows on affidavit that he has a legal or equitable defence, or shows facts which would make it incumbent on the holder to prove *consideration* (as to which, vide post, pp. 125, 126). As to the practice under this statute, see Reg. Gen., M. T. 1855, and H. T. 1858 (8 Ell. & Bl. 949); County Court Rules (Common Law), r. 271—275.

person whose name is on the bill as indorser when it came to the holder's hands: for each of these parties is a warrantor for the payment of the bill, and it is on the credit of their names (though also on that of the acceptor, where it was negotiated after acceptance), that the holder is supposed to have taken the bill. The right of the holder, however, to have recourse to the drawer and indorsers, is subject to these conditions; first, that he shall have presented the bill to the drawee for payment, on the precise day when it became due; and next, that he give reasonable notice of its non-payment (that is, under ordinary circumstances, notice on the following day; or to persons not residing in the same town, notice by the post of that day; or in case of a foreign bill, by the next ordinary conveyance) to all the parties whom he so intends to charge; or at the least gives notice to him whose name was last placed on the bill, in order that the latter may advise the party next before him, and so in succession, each party being allowed, in turn, a day for the purpose (*r*). However, by a recent Act, if the bill be payable on a "bank holiday," the notice of non-payment may be given on the day following (*s*). An indorser, so called upon and obliged to

(*r*) For points which have arisen in reference to the *notice of dishonour*, either upon *non-payment* or *non-acceptance*, and particularly in respect of its sufficiency in point of time and form, see the following cases:—*Solarté v. Palmer*, 1 N. C. 194; *Williams v. Smith*, 2 B. & Ald. 500; *Terry v. Parker*, 6 A. & E. 502; *Honsego v. Cowne*, 2 Mec. & W. 348; *Castrique v. Bernabo*, 6 Q. B. 498; *Armstrong v. Christiani*, 5 C. B. 687; *Caunt v. Thompson*, 7 C. B. 400; *Lysaght v. Bryant*, 9 C. B. 46; *Metcalf v. Richardson*, 11 C. B. 1011; *Bromage v. Vaughan*, 9 Q. B. 608; *Chard v. Fox*, 14 Q. B. 200; *Burmester v. Barron*, 17 Q. B. 828; *Everard v. Watson*, 1 Ell. & Bl.

804; *Rowe v. Tipper*, 13 C. B. 249; *Jennings v. Roberts*, 4 Ell. & Bl. 616; *Paul v. Joel*, 4 H. & N. 355; *Hirschfield v. Smith*, Law Rep., 1 C. P. 340; *Re Leeds Banking Co.*, ib. 1 Eq. Ca. 1; *Carew v. Duckworth*, ib. 4 Exch. 313; *Berridge v. Fitzgerald*, ib. 4 Q. B. 639.

(*s*) 34 Vict. c. 17. By this act "bank holidays" were first established. The holidays provided thereby are Easter Monday, the Monday in Whitsun-week, the first Monday in August, the 26th December (if a week day), and any other day specially proclaimed as such by her Majesty, either locally or throughout the kingdom.

pay, is, on the other hand, at liberty to have recourse to the drawer, or to any indorser prior to himself in order, provided such party shall have had due notice; and the same right attaches successively to each indorser, in his turn. But the original payee has of course no prior party to resort to but the drawer; and the drawer can resort to no party but the acceptor; on whom rests all the while the primary liability, and to whom the drawer, or any other party compelled to take up the bill, is always entitled to look for satisfaction.

We will next suppose the drawee to *refuse* acceptance, a refusal that the law will imply, unless he accepts immediately on presentment, or within twenty-four hours after the bill is left with him for the purpose (s). By such refusal, the person who is holder at the time becomes apprised that the bill is an ineffectual security, so far as the drawee is concerned: and is therefore entitled to charge the other parties, viz., the drawer and indorsers; and even to charge them *instantly*, as liable to immediate payment, though the bill is not yet arrived at maturity (t). But to justify any recourse against these parties, notice of the non-acceptance must be given to them, according to the same law and course of proceeding that was before stated in reference to the case of non-payment; and such of them as are consequently obliged to take up the bill are entitled, as in that case, to their remedy over against all prior parties. The holder is besides at liberty, after giving notice of non-acceptance, to take his chance that the bill may, notwithstanding the refusal to accept, be ultimately paid by the drawee; and may accordingly present it to him for that purpose when it comes to maturity, without thereby waiving his right of recourse against the other parties.

Another case still remains to be supposed, which is that

(s) 1 Lord Raym. 281.

(t) Accordingly it is from the refusal of acceptance, that the Statute

of Limitations begins to run against the demand of the holder. (Whitehead v. Walker, 9 Mee. & W. 506.)

of the bill being never presented for acceptance: for in general it is at the option of the holder whether he will make such presentment or not; the object of it being only to ascertain whether the bill is likely to be paid, and to strengthen its credit, if possible, by the additional security of the acceptor's name; though if a bill be drawn payable (as it often is) at a specified period *after sight* or *after demand*, a presentment for acceptance is in that particular case indispensable, in order to give sight to the drawee, or to make demand upon him; and thereby to fix the time at which the bill is to become due (*u*). But this case of a bill never presented for acceptance, will not require a separate discussion; for, where that ceremony is omitted, the bill must at all events be presented for payment; and the same law of proceeding against the drawer and indorsers will then apply, as already stated in reference to the case where an accepted bill is presented for payment.

Independently of the notice of non-acceptance and of non-payment, the holder is also entitled to have the bill, of which either acceptance or payment is refused, *protested*. And the *protest*—which is a formal declaration that the bill has been refused acceptance or payment, and that the holder intends to recover all the expenses to which he may be put in consequence thereof—must be made in writing under a copy of such bill of exchange, by some notary public; or if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses (*x*). In the case of a foreign bill, such protest is essential to the right of the holder to recover from the drawer or indorsers (*y*): and when made, due notice of dishonour having been also given, will entitle him to recover the amount of the bill,

(*u*) Chit. Bills, 272.

notarial acts, see 33 & 34 Vict.

(*x*) 2 Bl. Com. 469; Poth. pl. 84;

c. 97.

Chit. Bills, 216. As to the stamp duties payable on protests and other

(*y*) Chit. Bills, 332; Campbell v. Webster, 2 C. B. 258.

with interest, and all expenses, including the re-exchange, occasioned by returning it to the country where it was drawn (*z*). But upon an inland bill, the principal and interest may be recovered from these parties (due notice being given) without a protest (*a*); which is indeed a ceremony not usually observed with respect to bills of this description (*b*); though by statute 9 & 10 Will. III. c. 17, and 3 & 4 Anne, c. 9, an inland bill is made liable, if the holder thinks fit, to be protested. By 2 & 3 Will. IV. c. 98, a bill drawn payable in any place other than the residence of the drawee, and not accepted, may be afterwards protested for non-payment in such place accordingly; and no further presentment to the drawee shall be required.

A bill, of which acceptance is refused by the drawee, is sometimes accepted *supra protest*, for *honour of the drawer*, (or *for honour of the indorser*, as the case may be); that is, some friend of the drawer or indorser intervenes, to prevent the bill from being sent back upon him as unpaid, by placing his own name upon it as acceptor, after a protest has been drawn up declaratory of its dishonour by the drawee (*c*). This operates, not as an engagement to pay absolutely, but only to pay, in the event of its being presented for payment to the drawee, when it arrives at maturity,—of its being again dishonoured by him, and protested for non-payment,—and of its being afterwards duly presented for payment to the acceptor for honour. But, on these conditions being fulfilled, the latter is then absolutely liable, as if he had accepted in capacity of drawee, so far as regards the claim of any person whose name stands subsequent to his for whose honour the acceptance was made; while on the other hand the acceptor, upon being obliged to pay, has a right

(*z*) Mellish v. Simeon, 2 H. Bl. 378.

(*b*) Chit. Bills, 333, 465.

(*a*) Chit. Bills, 455; Windle v. Andrews, 2 Barn. & Ald. 701. See also 19 & 20 Vict. c. 60, s. 13.

(*c*) As to an acceptance *supra protest*, see Geralopulo v. Wieler, 10 C.B. 690; In re Overend, Gurney & Co., Law Rep., 6 Eq. Ca. 350.

of recourse against the person last mentioned, or against any party antecedent to him in the series of names (*d*). With respect to bills accepted in this method, or bills drawn “with a reference upon them in case of need,” (which is a form of draft occasionally adopted,) it is provided that it shall not be necessary to present them to the acceptors for honour, referee or referees, (nor where the address to these parties is in a different town, to forward them for such presentment,) until the day following the day on which they become due; or supposing the day following to be Sunday, Good Friday, Christmas-day, a day of public fast or thanksgiving, or a day appointed as a “bank holiday,” then not till the next day (*e*).

2. A *promissory note* (or *note of hand*) is an open letter of engagement from one man to another, promising to pay him a certain sum of money therein specified; and it may be made payable, like a bill of exchange, either “to A. B. or his order,” or “to the order of A. B.” or to “A. B.” without the word order, or “to bearer” (*f*). These instruments (*g*) are, by the statutes 3 & 4 Anne, c. 9, and 7 Anne, c. 25, made capable (if payable to order or bearer) of assignment, and placed generally upon the same footing with inland bills of exchange (*h*). So that almost every point of law which applies to the one, may be

(*d*) Hoare *v.* Cazenove, 16 East, 391; Williams *v.* Germaine, 7 Barn. & Cress. 468; Mitchell *v.* Baring, 10 Barn. & Cress. 4.

(*e*) 6 & 7 Will. 4, c. 58; 34 Vict. c. 17. Vide sup. p. 119.

(*f*) Bayley on Bills, 16; R. *v.* Box, 6 Taunt. 328.

(*g*) As to what amounts to a *promissory note* within the statutes of Anne, see Flight *v.* Maclean, 16 Mee. & W. 51; Drury *v.* Macauley, ibid. 146; Wood *v.* Mytton, 10 Q. B.

805; Absolon *v.* Marks, 11 Q. B. 19; White *v.* North, 3 Exch. 689; Gay *v.* Lander, 6 D. & L. 75; Storm *v.* Stirling, 3 El. & Bl. 832. In the statute 3 & 4 Anne, c. 9, promissory notes are described as notes signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, or to bearer, any sum of money therein mentioned.

(*h*) Carlon *v.* Kenealy, 12 Mee. & W. 139.

taken generally as applicable also to the other (*i*); with only this difference, that as a note is originally made between but two parties, viz. the maker and the payee, and there is no third party or drawee, as in the case of a bill, so all those legal incidents of a bill which regard the position of the drawee, and the nature and effect of an acceptance, are of course foreign to a note. The maker stands in the place both of drawer and acceptor, and is the party in every case primarily liable. To him the holder presents in the first instance for payment, when the note is at maturity; and, on his failure to pay, may resort to the indorsers, each of whom has in his order a right of recourse against the names anterior to his own, leaving to the first indorser, or original payee, no remedy except against the maker himself (*k*).

A bill of exchange and a promissory note, as compared with other contracts, or instruments of contract, possess some legal properties of a peculiar kind. First, though the sum of money for which a bill or note is drawn is a chose *in action*, not in possession, and by the general rule would consequently be incapable of assignment, yet if the bill be payable to order or bearer, it is liable, as we have seen, to be assigned (*l*). Thus if A. draws on B. in favour of C. or order—and C. indorses over to D.—the right to receive the money from B., which was before vested in C., is now transferred (as well as the instrument itself) to D.: and with it the right of action, in the event

(*i*) The provision of 18 & 19 Vict. c. 67 (mentioned sup. p. 118, in notis) applies, it will be observed, to promissory notes as well as to bills of exchange.

(*k*) As to the necessity for presentment, see *Sands v. Clarke*, 8 C. B. 751. It is to be observed, that promissory notes are not subject to any provision similar to that contained in 1 & 2 Geo. 4, c. 78

(vide sup. p. 118), as to the acceptance of a bill of exchange; and consequently if they are made payable at any specified place, they must be presented *there* for payment—though no restrictive words be added. (*Spindler v. Grellett*, 1 Exch. 384.)

(*l*) 2 Bl. Com. 468. Vide sup. p. 50.

of its dishonour, against the parties (severally) by whom it was drawn, indorsed, or accepted. Again, though by the general rule of law, a party can give no better title to a thing personal than he himself possesses; yet he who has obtained by wrongful means the possession of a bill or note drawn payable to order and indorsed in blank, or drawn payable to bearer,—is competent to make a valid transfer of the instrument and its contents, by indorsing (or even merely delivering) it for valuable consideration, to a person unaware and unsuspicious of the defect in the title (*m*). Thus, if a bill be drawn by A. in favour of B. or order, who indorses it in blank to C., and it be afterwards stolen by D., and by him indorsed over, or merely delivered, to E. for a valuable consideration before it is due,—the latter (supposing him to have taken it *bonâ fide*) will become the lawful holder of it, even as against C., from whom it was stolen (*n*). In this particular the instruments in question—and indeed all others of a negotiable kind, which are transferable by mere delivery—are, for the benefit of commerce, placed upon the same basis with the current coin of the realm; which (as we have already found occasion to observe) passes freely from man to man, without regard to any defect in the title of him who pays it over, provided it be paid for valuable consideration, to an innocent party (*o*). Another important characteristic of a bill or note, and one founded on the same mercantile policy, is this, that though a party suing another for the breach of a simple contract, is in other instances obliged to prove the *consideration* on which the promise was made, and on failure of such proof will be defeated; yet no evidence on this point is required from the holder of a security of this nature, for he is in

(*m*) Vide sup. p. 52. And see
Lowndes v. Anderson, 13 East, 135;
Gill v. Cubitt, 3 Barn. & Cress. 466;
Backhouse v. Harrison, 3 Barn. &
Adol. 1098.

(*n*) Beekwith v. Corral, 3 Bing.
444; Goodman v. Harvey, 4 Ad. &
El. 870.

(*o*) Vide sup. p. 52.

general called upon to prove nothing beyond the signature of the party charged: every bill or note being deemed, in law, to carry with it *primâ facie* evidence of a sufficient consideration (*p*). However, if the defendant is on *his* side in a condition to show that he received *no* consideration, and also (in the case of his being sued by a third party) that the holder gave none, the claim of the plaintiff will be barred (*q*). For the general principle which governs other simple contracts applies also to a bill or note; namely, that *ex nudo pacto non oritur actio*: and hence it is usual to express on the face of these instruments, that *value* has been *received* by the drawer or maker, though, even without such words, a good consideration for the contract will (as already explained) be presumed in the absence of any proof to the contrary (*r*).

Such, in a general view, is the state of the law relative to bills of exchange and promissory notes. It remains only to add (as to the *amount* for which a bill or note may be drawn), that by statute 48 Geo. III. c. 88, s. 2, all promissory or other notes, bills of exchange, drafts and undertakings in writing, being negotiable or transferable, for the payment of less than 20s., were declared to be null and void, and it was made penal to utter or publish them; and that by statute 7 Geo. IV. c. 6, the making or issuing of promissory notes payable on demand *to bearer*, for any sum less than 5*l.*, was prohibited under a penalty. However, by 23 & 24 Vict. c. 111, s. 19, it is now made lawful for any person to draw upon *his banker*, holding money to his use, any draft or order for the payment, either to the

(*p*) 2 Bl. Com. 446; Byles on Bills, p. 72.

(*q*) See Crofts v. Beale, 11 C. B. 172. It is said by Blackstone (vol. ii. p. 446), that "if a man enter into a voluntary bond, or give a promissory note, he shall not be allowed to aver the want of a consideration:" but this is not true as regards a

promissory note or bill of exchange; which, as to their consideration, are subject to the law stated in the text.

(*r*) 2 Bl. Com. 468. See Grant v. De Costa, 3 Mau. & Sel. 351; Highmore v. Primrose, 5 Mau. & Sel. 65; Hatch v. Traves, 11 Ad. & El. 702.

bearer or to order on demand, of any sum of money though less than 20s. (*s*).

VIII. Among the forms of contract which are deserving of a distinct notice must also be included *policies of insurance*.

These are instruments by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation, if or when the event shall happen by which the loss is to accrue. The effect of such a contract is obviously to protect the latter party (or *assured*, as he is called) from the hazard to which he would otherwise be exposed, and to throw it upon the *insurer*, or party giving the indemnity. And yet it is no less clear, that where this party carries on a general trade or business of insurance, he is, in a great measure, protected on his part also from risk; for though he may be greatly a loser by the particular adventure, he may adjust the premium he demands on this and other similar transactions, at such an amount as—upon a calculation of the average value of the chance—shall secure him compensation, and even profit, in the result of a sufficiently extended series of adventures. It is evident, too, that such contracts are most safe and beneficial to both the parties concerned when the indemnity is given by a competent number of persons, and not merely by an individual. For a body of insurers afford, by their collective liability, a stronger security to the assured, than if he had to depend upon the solvency of any single contractor; and, on the other hand, are themselves protected, in the ratio of their number, from the ruin which might other-

(*s*) At one time the issue of bills or notes to the amount of 20s. and less than 5*l*. was prohibited by 17 Geo. 3, c. 30. But the operation of this Act has been from time to time

suspended (see 17 & 18 Vict. c. 83; 26 & 27 Vict. c. 105; 35 & 36 Vict. c. 88, and 36 & 37 Vict. c. 75). As to the *stamps* imposed on bills and notes, see 33 & 34 Vict. c. 97.

wise be the result of a heavy loss, or of a long continued series of misadventures. The losses against which such indemnities are most commonly taken are those which occur at sea, by fire, and by death (*t*); and this gives rise to the three several denominations of marine insurance, fire insurance, and life insurance (*u*).

Marine insurance (a mercantile invention of incalculable importance to the interests of commerce) is held by writers of the highest eminence to have been unknown to the antients (*x*); and is said to have been introduced into this country by the Lombards, in the course of the thirteenth century; a supposition the more probable (as remarked in a work of authority), because the Italians were the earliest improvers of commercial science in Europe during the middle ages (*y*). No trace of the invention, however, has been found in our legal history prior to the reign of Elizabeth (*z*); but by 43 Eliz. c. 12 (*a*), a particular court, called the court of policies of assurance, was established for the trial, in a summary way, of causes relating to contracts of this description. And the proceedings of that court were further regulated by the statute 13 & 14 Car. II. c. 23; but owing to some fundamental

(*t*) In one instance mentioned in the books, an insurance of a fortress against the attacks of a foreign enemy was held valid. (*Carter v. Boehm*, 3 Burr. 1905.) But though called a "fort," the place was, in truth, merely a factory or settlement for trade,—a fact which appears to have influenced the judgment of the court.

(*u*) Some societies also insure against losses occasioned by accidents not of a *fatal* character.

(*x*) Grotius de Jure Belli, l. 2, c. 12, f. 3; Bynkershoek, Quæst. Juris Publici, l. 1, c. 21.

(*y*) Park's Insurance, Introd.

xxxvii. 7th edit.

(*z*) The earliest case on this subject, found by Mr. Justice Park, (as noticed in his work referred to in the last note,) occurs in the 30 & 31 of Elizabeth, and is reported 6 Rep. 47 b.

(*a*) It is observable that this statute speaks of insurances as having existed *time out of mind*, in this kingdom and abroad. Perhaps, however, this is insufficient to refute the opinion, that their introduction is to be referred to the thirteenth century when the Lombards first came into England.

defects in its constitution, and the preference given to the ordinary tribunals, it has long since fallen into entire disuse.

Marine insurances are most commonly undertaken by private persons (or by firms) carrying on this branch of business (*b*); and a certain number of these usually subscribe the instrument (or *policy*, as it is called), each engaging, on his or their own separate account, to indemnify the assured to the extent of a particular sum of money, being a proportion of the whole value of the subject of insurance; and such persons are called, in reference to the method used of thus subscribing their names, *underwriters*. But marine insurances may also be made by bodies incorporated by a private Act or charter, or by joint-stock companies established under 25 & 26 Vict. c. 89 (*c*). Special regulations have been made by the legislature relative to this species of insurance. Thus, in order to prevent inconvenience to the public from policies being made *in blank*, that is, without specifying the names of the persons for whose benefit, or on whose account, they were made (*d*)—it was provided by 28 Geo. III. c. 56, that no policy of insurance on ship or goods shall be valid, unless there be inserted therein, before it is made or effected, the name or usual style of one or more of the persons in-

(*b*) As to the liability *inter sese* of the members of a firm carrying on the business of underwriting, see *Gray v. Gibson*, Law Rep., 2 C. P. 120.

(*c*) See 25 & 26 Vict. c. 89, ss. 3, 44. By this last provision, a marine insurance company established under that Act must make, and keep affixed in their places of business, a statement as to the position of their affairs. At one time the Royal Exchange Assurance and the London Assurance Companies enjoyed (un-

der 6 Geo. 1, c. 18; 8 Geo. 1, c. 15, and 11 Geo. 1, c. 30), a monopoly of the business of underwriting by corporations or partnerships, as well as of lending money on bottomry. But by 5 Geo. 4, c. 114, this restriction was removed. It may be noticed here, that many individuals carrying on the business of underwriting have formed themselves into an association known as "Lloyd's," the members of which underwrite each other's policies.

(*d*) *Park's Insurance*, 18, 7th ed,

terested (*f*), or if not, then of the consignor or consignee of the goods, or of the person in Great Britain who shall receive the order for or shall effect such policy, or of the person who shall give the order to the agent immediately employed to negotiate or effect the same. Until a recent period, moreover, the practice of *re-assurance*, in reference to maritime insurance, that is to say, a contract whereby an insurer seeks to relieve himself from a risk which he may have incautiously undertaken, by throwing it upon some other underwriter (*g*), was forbidden by the law, except in certain specified cases. But the 19 Geo. II. c. 37, s. 4, by which this restriction was made, has been now repealed (*h*). Re-assurance is not to be confounded with *double insurance*; which is, where a person, being fully insured by one policy, effects another on the same subject, with some other insurer or insurers; for this has always been held a lawful contract, and the assured may recover the amount of his actual loss against either set of underwriters. But inasmuch as a marine insurance is a contract of indemnity only, the law will not allow him to recover beyond that amount; and if he thus obtains full satisfaction upon either of his policies, the underwriters upon this are entitled to contribution from the underwriters upon the other (*i*). The statute law upon the subject of marine insurances contains moreover a provision (35 Geo. III. c. 63, s. 12), that no policy upon any ship, or upon any share therein, shall be made for any certain term exceeding twelve calendar months. And another (31 & 32 Vict. c. 86), that any assignee of such policy, who is beneficially interested therein, may sue thereon in his own name.

The subject of marine insurance is most usually ship, or

(*f*) See *Wolf v. Horncastle*, 1 Bos. & Pul. 316.

(*g*) *Park's Ins.* 418, 7th ed.; *Andree v. Fletcher*, 3 T. R. 266; *Delver v. Barnes*, 1 Taunt. 48.

(*h*) 30 & 31 Vict. c. 23, in sched. See also 27 & 28 Vict. c. 56, s. 1, and 30 & 31 Vict. c. 59, in sched.

(*i*) *Park's Ins.* 422, 7th ed.

goods, or both; though it is also common to insure the freight which the vessel is about to earn, or the profits expected from the cargo (*k*). The risks insured against are, by the ordinary form of a policy, as follows:—perils of the seas, which comprise all the dangers incident to navigation (*l*)—capture by a public enemy, or by pirates or thieves (*m*)—fire (*n*)—*jettisons* (*o*), that is, the voluntary throwing overboard of goods or merchandize, in time of distress—arrests or embargoes laid on by public authority (*p*)—and fraudulent conduct, or *barratry*, of the master or mariners (*q*). Against all these risks the underwriters (in consideration of a premium paid down) severally engage to give their indemnity to the extent of a specified sum, during the particular voyage specified in the policy; and even if the vessel should have been lost at the time when the policy is executed (such fact being then unknown to both parties), the insurance is, by the ordinary form of these contracts, binding nevertheless,—it being the practice in our English policies to insure “lost or not lost,” words not usually inserted in the insurances of other

(*k*) See *Camden v. Anderson*, 6 T. R. 729; *Miller v. Warre*, 6 Barn. & Cres. 538; *Deveaux v. Steele*, 6 Bing. N. C. 358.

(*l*) As to loss by *perils of the seas*, see *Cullen v. Butler*, 5 M. & Sel. 461; *Dixon v. Sadler*, 5 Mee. & W. 405; *Lawrie v. Douglas*, 15 Mee. & W. 746; *Benson v. Duncan*, 3 Exch. 644; *Chope v. Reynolds*, 5 C. B., N. S. 642; *Kay v. Wheeler*, Law Rep., 2 C. P. 302.

(*m*) As to loss by *capture*, see *Brandon v. Curling*, 4 East, 410; *Le Cheminant v. Pearson*, 4 Taunt. 367.

(*n*) As to loss by *fire*, see *Busk v. Royal Exchange Assurance Company*, 2 Barn. & Ald. 73; *Pattison*

v. Mills, 2 Bligh, N. S. 519.

(*o*) As to loss by *jettison*, see *Butler v. Wildman*, 3 B. & Ald. 398; *Fletcher v. Alexander*, Law Rep., 3 C. P. 375; *Dickenson v. Jardine*, ib. 639.

(*p*) As to loss by *embargo*, see *Rotch v. Edie*, 6 T. R. 413; *Schroder v. Thompson*, 7 Taunt. 462.

(*q*) In *Lewen v. Suasso* (see 1 Arnould on Insurance, 3rd. ed. p. 712) Lord Hardwicke defines “*barratry*” as “an act of wrong done by the master against the ship and goods.” As to loss by *barratry*, see *Roscoe v. Corson*, 8 Taunt. 684; *Grill v. General Iron Screw Collier Company*, Law Rep., 1 C. P. 600.

nations (*r*). But the voyage marked out in the policy must be always exactly pursued; for the slightest *deviation* from it, except under circumstances of absolute necessity, will render the insurance ineffectual; and that whether the loss be occasioned by the deviation or not, and whether the ship resume her proper course or not before the loss happens (*s*). Every marine policy too is made under an implied warranty, that the ship shall, at the time of her setting sail, be *seaworthy*, that is, in a condition to perform the voyage; and, if the fact turns out to have been otherwise, the assured is not entitled to recover in the event of a loss, whether the loss have proceeded from the defects in her condition, or from any other cause (*t*).

The assured is entitled to claim upon the policy, not only where he is able to give direct proof of loss, but where he can show circumstances from which a loss may reasonably be presumed; as that a sufficient time has elapsed for receiving intelligence of the vessel since her departure, and that none has been received: for it will be inferred, under such circumstances, that she has foundered (*u*). But where direct proof of the calamity is given, it may turn out that it is either a *total*, or a *partial* (called also an *average*), loss (*x*). A total loss, again, may be either

(*r*) Park's Ins. 33, 7th edit.; Marsh. Ins. 338, 3rd ed.; see Mead v. Davison, 3 Ad. & El. 303; Sutherland v. Pratt, 11 Mee. & W. 296.

(*s*) See Elliott v. Wilson, 7 Bro. Parl. Cas. 459; Davis v. Garrett, 6 Bing. 716; Brown v. Tayleur, 4 Ad. & El. 241; Hamilton v. Sheddon, 3 Mee. & W. 49; Oliverson v. Brightman, 8 Q. B. 781; Pratt v. Ashley, 1 Exch. 257.

(*t*) Park's Ins. 221, 229; see Annen v. Woodman, 3 Taunt. 299; Harrison v. Douglas, 3 Ad. & El.

396; Hollingsworth v. Brodrick, 7 Ad. & El. 40; Barr v. Gibson, 3 Mee. & W. 390; Dixon v. Sadler, 5 Mee. & W. 414; Phillips v. Nairne, 4 C. B. 343; Knull v. Hooper, 2 H. & N. 277; Thompson v. Hopper, 1 E. & E. 1038; Burges v. Wickham, 3 B. & Smith, 669.

(*u*) 1 Park's Ins. 106; Koster v. Reed, 6 Barn. & Cress. 19.

(*x*) As to "total" and "partial" loss, see Shawe v. Felton, 2 East, 109; Davy v. Milford, 15 East, 559; Wilson v. Forster, 6 Taunt. 25; Sarquy v. Hobson, 2 B. & C. 7; Mordy

actual or constructive (*y*); the first, where the thing insured is absolutely destroyed, so as to remain no longer in specie, or so damaged that it cannot ever arrive in specie at the port of destination; the second, where the injury it has sustained (though short of that above supposed) is so great, as to make it reasonable that the assured should claim as for a total loss, leaving the underwriter to recover what he can out of the shipwreck or other calamity (*z*). And this case seems to arise, whenever the nature of the loss is such as to afford reasonable ground to the assured for relinquishing the voyage altogether; as where the goods are so damaged as not to be worth the expense of being forwarded (*a*). But in order to claim as for a total loss, when in fact it is so by construction only, the assured is bound formally to cede or *abandon* all his remaining right in the property to the underwriter; and unless notice be given him of such abandonment, within a proper time after intelligence of the circumstance is received, the loss will be treated as a partial one only (*b*). In every case of partial loss, the underwriter is liable to pay such proportion of the sum he has subscribed, as the damage sustained by the subject of insurance bears to its whole value at the time of insurance; in the case of a total loss, he is liable to the entire amount of his subscription (*c*).

The underwriter is also, by the effect of a special clause

v. Jones, 4 B. & C. 394; *Rosetto v. Gurney*, 11 C. B. 176; *Ralli v. Johnson*, 6 Ell. & Bl. 422; *The Great Indian Peninsular Company v. Saunders*, 1 B. & Smith, 41; *Farnworth v. Hyde*, Law Rep., 2 C. P. 204; *Kidston v. The Empire Marine Insurance Company*, ib. 357.

(*y*) 3 Chit. Com. l. 511; *Roux v. Salvador*, 3 Bing. N. C. 281.

(*z*) *Park, Ins.* 143, 146; *Roux v. Salvador*, ubi sup.

(*a*) *Hudson v. Harrison*, 3 Brod. & Bing. 97; *Roux v. Salvador*, ubi sup.

(*b*) See *Mitchell v. Edie*, 1 T. R. 608; 2 Marsh. 508; *Dean v. Hornby*, 3 Ell. & Bl. 180. As to what amounts to "abandonment," see *Hudson v. Harrison*, 3 Brod. & Bing. 97; *Roux v. Salvador*, ubi sup.; *Chapman v. Benson*, 5 C. B. 330.

(*c*) *Lewis v. Rucker*, 2 Burr. 1172. The 3 & 4 Will. 4, c. 42, s. 29, empowers a jury, in actions on policies of insurance, to give damages in the nature of interest, over and above the sum recoverable under the policy.

usually introduced into marine policies (*d*), made liable to indemnify the assured in respect of any payment he may have properly made for *salvage*; that is, for the defence, safeguard or recovery of the ship or goods (*e*); or in respect of *general average*; which latter subject is of a kind to require some further explanation (*f*). The term general (or gross) average is used to express the contribution, which, by the commercial law of every country in Europe (*g*), is made by the proprietors, in general, of ship or cargo, towards the loss sustained by any individual of their number, whose property has been sacrificed for the common safety; as where, in a storm, jettison is made of any goods, or sails or masts are cut away, *levandæ navis causâ* (*h*). But to found this obligation, it is essential that the ship should be eventually saved; and that the sacrifice so made should have in fact conduced to her preservation: and also that any part of the cargo so thrown overboard should have been laden at the time in a proper and usual manner; for it has been decided that goods stowed upon the deck (unless where a special custom authorizes that method) are not entitled to the benefit of general average (*i*). By our law, not only the ship and cargo, but also the freight, is liable to contribute to a general average (*h*); and the way of settling the contribution among the several parties, on the arrival of the ship at the port of destination, is to ascertain the proportion that the value of the property sacrificed

(*d*) *Le Cheminant v. Pearson*, 4 Taunt. 367.

(*e*) 3 Chit. Com. L. 502. As to salvage, see 17 & 18 Vict. c. 104, ss. 458, 484, et sup. p. 18. It may be here remarked that, by 17 & 18 Vict. c. 120, a former statute as to salvage (1 & 2 Geo. 4, c. 76) is, with the exception of sects. 1—5, 15, 16, 18, repealed; and that another previous statute on the same subject (9 & 10 Vict. c. 99) is wholly repealed.

(*f*) *Le Cheminant v. Pearson*, ubi sup.

(*g*) Park, Ins. 121.

(*h*) As to general average, see *Birkley v. Presgrave*, 1 East, 220; *Moran v. Jones*, 7 Ell. & Bl. 523; *Miller v. Tetherington*, 7 H. & N. 954; *Kemp v. Halliday*, Law Rep., 1 Q. B. 520.

(*i*) *Gould v. Oliver*, 4 Bing. N. C. 134; 2 Man. & Gr. 209.

(*k*) *Da Costa v. Newnham*, 2 T. R. 407.

bears to the entire value of the whole ship, cargo, and freight—such estimate being made according to the net value of the several articles, if there brought to sale,—and to make the property of each owner (including the property sacrificed) contribute to the common loss, in the proportion so found (*l*). A party obliged to make payment of such quota to the owner of the property sacrificed, is entitled, upon the ground already stated, to seek, in his turn, compensation from the underwriters with whom he may have effected an insurance upon the property liable to the contribution (*m*).

In *Fire and Life Insurances*, the insurers are, on the other hand, commonly large companies of persons associated together (*n*); and their policies, much more precise in their form than those of marine insurers, distinctly define the several incidents and consequences of the contract, so as to leave comparatively little to the construction of the law. The substance of the contract in these several cases is as follows:—

A *fire policy* engages, that, in consideration of a single or periodical payment of premium (as the case may be), the company will pay to the assured such loss as may occur by fire to his property therein described, within the period or periods therein specified, to an amount not exceeding a particular sum fixed for that purpose by the policy (*o*).

A *policy on life* usually engages, that, in consideration of a single or periodical payment of premium, the company will pay, on the death of some individual, or on his death within a limited period (as the case may be) a certain sum of money therein specified; that is, will pay it to the party

(*l*) See Abbott on Shipping, 348, 3rd edit.

(*m*) These mutual contributions are often settled by the award of persons who have acquired special knowledge of the principles of commercial law on these matters, and who are known as *average adjusters* or *staters*.

(*n*) These may be joint-stock companies under 25 & 26 Vict. c. 89; see ss. 3, 44, of that Act.

(*o*) It may be observed that, prior to the 25th June, 1869, there was a duty charged on every fire insurance. But this was taken away by 32 & 33 Vict. c. 14.

effecting the insurance (supposing it to be effected by a stranger, having an interest in the life insured), or to the executors or administrators of the party whose life is insured, supposing him to effect it for his own benefit. Under a recent statute (30 & 31 Vict. c. 144), any person becoming entitled to such a policy by assignment or other derivative title, and having a right in equity to give an effectual discharge to the insurance company, is at liberty, on giving notice of such assignment to the company, to sue on the same at law in his own name. And by the “Life Assurance Companies Act, 1870” (33 & 34 Vict. c. 61), a variety of provisions were made, placing societies established for the purpose of issuing policies of assurance on human life under the general superintendence of the Board of Trade, and compelling them, among other things for the protection of their customers, to furnish annual statements of their accounts, and furnish copies thereof to each shareholder and policy-holder of the company, which statements are to be laid before parliament (*o*).

It may be here further remarked, that it forms one of the provisions of “The Married Women’s Property Act, 1870” (33 & 34 Vict. c. 93), that a wife may effect a policy on her own or her husband’s life for her separate use, in as valid a way as if she had been an unmarried person; and that a policy effected by a married man on his own life, expressed on the face of it to be for the benefit of his wife or children, shall enure and be deemed a trust for her benefit for her separate use, or for the children, according to the interest declared; and that a policy so framed shall, so long as the object of the trust remains, be free from the control of the husband, and not be subject to his debts (*p*).

(*o*) This Act (which has been amended by 34 & 35 Vict. c. 58, and by 35 & 36 Vict. c. 41) was passed in consequence of the failure of the Albert and of the European Life Assurance Companies,—to wind up whose affairs, which involved

pecuniary interests to an immense amount, a special tribunal in the nature of a court of arbitration was established by 34 & 35 Vict. c. xxxi. and by 35 & 36 Vict. c. cxlv.

(*p*) 33 & 34 Vict. c. 93, s. 10.

As to the contract for insurance, of whatever description, it is a rule that the assured must have an *interest* in the subject-matter thereof (either in his own right, or at least as trustee), equal to the amount of the sum insured; that, beyond the extent to which he possesses an interest, the contract will not be effectual (*q*): and that the interest must also be one of a pecuniary kind (*r*). Indeed that he must have such an interest is, in marine and fire policies, indicated by the very terms of the instrument, which purports to indemnify against *loss*. A practice nevertheless formerly obtained in *marine* insurances, of insuring large sums without having any property on board, which were called insurances “interest or no interest” (*s*); and though the policies in such cases amounted obviously to a species of wager, yet where they bore that character on the face of them, by the insertion of such words as “interest or no interest,” and the like,—and were consequently not framed as proper insurances,—there was nothing at the common law to prevent their taking effect in the way of wager, according to the design of the parties (*t*). It was thought proper, however, at length to repress them by a positive regulation; and it is consequently enacted by 19 Geo. II. c. 37, s. 1, that all insurances on British ships or goods (*u*), “interest or no interest,” or without further proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, (all of which had the same pernicious tendency,) shall be totally null and void,—subject only to certain exceptions in that Act specified. And by a later statute, provisions are made against other wagering speculations by way of insurance. For by 14 Geo. III. c. 48, it is enacted, that no insurance shall be made on the life or lives of any person or persons,

(*q*) See *Rhind v. Wilkinson*, 2 Taunt. 237; *Sparks v. Marshall*, 2 Bing. N. C. 761; *Stockdale v. Dunlop*, 6 Mee. & W. 224; *Devanx v. J'Anson*, 5 Bing. N. C. 519; *Seagrave v. Union Marine Insurance Company*, Law Rep., 1 C. P. 305.

(*r*) *Halford v. Kymer*, 10 B. & C. 724.

(*s*) 2 Bl. Com. 460.

(*t*) *Cousins v. Nantes*, 3 Taunt. 513.

(*u*) See *Crawford v. Hunter*, 8 T. R. 13.

or on any other event or events whatsoever, wherein the person or persons for whose benefit, or on whose account, such policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance so made shall be void (*x*). And further, that it shall not be lawful to make any policy, without inserting therein the name of the person interested, or for whose use, benefit, or account it was made (*y*); and that no greater sum shall be recovered from the insurer than the amount of the interest of the assured, in the life or lives, or other event or events. It is, however, observable in reference to *life* policies (*z*), that a man is always considered as having an interest in his own life (though not in that of his wife or child) of a kind that justifies his effecting an insurance upon it to any amount (*a*), and that a policy effected on the life of his debtor is also valid to the extent of the sum due.

Another principle universally applicable to insurances is this, that, independently of *fraud*,—which in this, as in every other instance of contract, always entitles the party imposed upon to annul the transaction (*b*),—any *misrepresentation* of fact, on the part of the assured (whether made by himself, or by his agent without his knowledge), upon a point material to the insurer's guidance in estimating the risk, will discharge the latter from his liability; and this is so, whether the loss which actually happens has any connection with the matter misrepresented or not (*c*). And

(*x*) See *Shilling v. Accidental Death Company*, 2 H. & N. 42; *Hebdon v. West*, 3 B. & Smith, 579; *Wilson v. Jones*, Law Rep., 2 Exch. 139.

(*y*) See *Hodson v. Observer Life Assurance Company*, 8 Ell. & Bl. 40; *Evans v. Bignold*, Law Rep., 4 Q. B. 622.

(*z*) In *Dalby v. The India and London Life Assurance Company*, 15 C. B. 365, it was decided that the statute 14 Geo. 3, c. 48, does

not invalidate a policy for the life of another, in which the assured was interested at the time of effecting the policy, but in which his interest ceased before the death happened. By this decision a former case of *Godsall v. Boldero*, 7 East, 72, was overruled.

(*a*) *Halford v. Kymer*, 10 B. & C. 729.

(*b*) Vide sup. p. 61.

(*c*) *Park, Ins.* 177; per *Holt, C. J.*, *Skin.* 327; see *Anderson v. Fitz-*

the law is the same with respect to the *concealment* of any circumstance of the like description, provided it were known to the assured at the time of effecting the policy (*d*).

Lastly, we may notice as an additional rule of general application (though it is exemplified more frequently in marine than in other insurances), that when a policy becomes void *ab initio*, and from a cause not amounting to any fraud or breach of law on the part of the assured—as where, in a marine insurance, the ship, though believed to be sea-worthy, turns out not to have been so, contrary to the implied warranty on that subject; or sails alone, contrary to an express warranty to sail with convoy,—the insurer is bound to refund the premium: for, as in such cases he was never legally liable to the risk, it would be unjust that he should retain the consideration (*e*). But where a policy is void through the fraud of the assured, or from being made in contravention of some positive law (as in the case of a wagering policy), the assured is not allowed to reclaim the premium: and in instances of this latter description, the mutuality of the fault makes no difference; for here the maxim is held to apply that *in pari delicto, potior est conditio possidentis* (*f*).

gerald, 4 H. of Lords' Cases, p. 484; *Fowkes v. Manchester and London Assurance Association*, 3 B. & Smith, 917; *Perrins v. Marine, &c. Insurance Society*, 2 Ell. & Ell. 317.

(*d*) *Park, Ins.* 178; see *Carter v. Boehm*, 3 Burr. 1905; *Wainwright v. Bland*, 1 Mee. & W. 32; *Geach v. Ingall*, 14 Mee. & W. 100; *Russell v. Thornton*, 4 H. & N. 788; 6 H. & N. 140; *Holland v. Russell*, 1 B. & Smith, 424. See the case of a *guarantee* distinguished, in respect of the rule mentioned in the text, from a contract of assurance, *The North British Insurance Company v. Lloyd*, 10 Exch. 523. See also *Harrower v. Hutchinson*, Law Rep.,

5 Q. B. 584.

(*e*) *Park, Ins.* 372. See as to return of premium in case of over-insurance, *Fisk v. Masterman*, 8 Mee. & W. 165.

(*f*) *Park, Ins.* 372, 377; see *Wil-lis v. Baldwin*, Doug. 451; *Vandyck v. Hewitt*, 1 East, 96; *Boehm v. Bell*, 8 T. R. 154; *Morek v. Abel*, 3 Bos. & Pul. 35. It has been said, though the position is perhaps not free from doubt, that this rests partly on the distinction between executed and executory contracts; and that if in such cases an action be brought to recover back the premium, *before the risk is over*, it may be recovered. (*Park, Ins.* 373.)

In the last place we shall notice,

IX. *Charterparties.*

These are mercantile instruments (with or without seal), by which one who would export goods from this country, or import them from abroad, engages for the hire of an entire vessel for the purpose, at a freight or reward thereby agreed for (*g*). Upon the execution of such an instrument the ship is said to be *chartered* or *freighted*, and the party by whom she is engaged is called the *charterer* or *freighter*. But where, instead of taking the entire vessel, the owner of goods merely bargains for their conveyance on board of her for freight (other goods being at the same time conveyed for other proprietors), she is described, not as a chartered but a *general* ship; and in this case no charter-party is usually executed, but merely a bill of lading (*h*).

A charterparty, more particularly considered, is commonly made between either the owner or the master of the ship (as the case may be) on the one part, and the owner of the goods on the other (*i*); and purports to be an agreement that the ship shall be employed in the conveyance of goods for a certain voyage (or for a certain period of time), at a certain amount of freight, calculated at so much per ton, or at so much per month during the voyage. The instrument also usually engages, on the part of the ship-owner, that, being sea-worthy, and provided with necessities, she shall receive a full cargo on board,—not exceeding what she can reasonably carry (*k*),—and that the same shall be properly stowed; and that the ship shall then

(*g*) As to "freight," see *Lewis v. Marshall*, 7 Mau. & Gr. 729; *Fenwick v. Boyd*, 15 Mee. & W. 632; *Michael v. Gillespy*, 2 C. B. (N. S.) 627.

(*h*) 3 Chit. C. L. 388, 403.

(*i*) See the following recent cases which have arisen on charterparties: *Alsager v. St. Katherine Dock Company*, 14 Mee. & W. 794; *Hill v.*

Sughrue, 15 Mee. & W. 253; *Robertson v. Jackson*, 2 C. B. 412; *Olive v. Booker*, 1 Exch. 417; *Schmaltz v. Avery*, 16 Q. B. 655; *Read v. Hoskins*, 4 Ell. & Bl. 979; *Roelants v. Harrison*, 9 Exch. 444; *Cuthbert v. Cumming*, 10 Exch. 809.

(*k*) As to these words, see *Gould v. Oliver*, 4 Bing. N. C. 134.

immediately sail (wind and weather permitting) on the specified voyage, and deliver the cargo (the act of God or of the king's enemies excepted) at the port of destination, to the charterer or his assignees, in as good order as they were received on board. On the other hand, there are ordinarily engagements on the part of the charterer, that he will supply a full cargo (*l*), and load and unload the goods within a certain number of days (usually called *lay* or *running* days), and pay freight as agreed upon; and that, if he detains the vessel beyond the running days, he will also pay *demurrage*, that is, a certain amount *per diem* for the whole period of such extraordinary detention (*m*).

In the performance of this contract, it is held to be the ship-owner's duty to take good care of the cargo during the voyage (*n*): and he will be liable to make satisfaction for any damage resulting from the master's negligence in this respect; or for the loss or non-delivery of any of the goods of which it consists, unless occasioned by causes within the exceptions of the charterparty (*o*). But, under the ordinary exceptions, the ship-owner is protected from liability for the accidents of wind and weather, not imputable to his own negligence; for these fall within the exception as to the "act of God." Supposing the goods, on the other hand, to arrive safely, the ship-owner is not bound to deliver them (unless there be some stipulation to that effect) until he receives payment of the freight; for these acts are in general considered in law as contemporaneous (*p*). Yet where the charterparty is in such form

(*l*) See *Capper v. Foster*, 3 Bing. N. C. 938.

(*m*) As to demurrage, see *Benson v. Blunt*, 1 Q. B. 870; *Robertson v. Jackson*, 2 C. B. 412; *Cropton v. Pickernell*, 16 Mee. & W. 829; *Parker v. Winslow*, 7 Ell. & Bl. 942; *Oglesby v. Yglesias*, 1 E. & E. 930; *Erichsen v. Barkworth*, 3 H. & N. 894; *Seeger v. Duthie*, 8

C. B. (N. S.) 45.

(*n*) *Abbott on Shipping*, 255.

(*o*) By 25 & 26 Vict. c. 63, s. 54, the liability of the shipowner, in respect of any damage or loss caused, "without his actual fault or privity," to any goods, merchandise, or other things on board, is limited in such manner as therein provided.

(*p*) *Yates v. Railston*, 8 Taunt. 293.

as to amount to an actual demise of the vessel to the charterer, and there is no express stipulation for the payment of freight simultaneously with the delivery of the cargo,—such delivery cannot lawfully be withheld on the ground that the freight is not paid: for the goods are, in that case, in the ship-master's possession as servant, *pro hac vice*, of the charterer(*q*).

If the ship-owner, being prevented by an accident for which he is not responsible, from entirely performing his contract, yet performs it in part, by carrying the cargo safely during a certain portion of the voyage, and the charterer receives the benefit of such performance, freight will then be due *pro ratâ itineris*. Thus if the cargo be captured by an enemy during the voyage, and be retaken, and ultimately come to the charterer's hands,—or if the ship be lost by stress of weather before the termination of the voyage, and the cargo be sent on by another vessel to the charterer,—he will be liable in either of these cases (at least in the event of his accepting the goods), to pay the owner of the chartered vessel freight *pro ratâ*, that is, to an amount proportioned to the distance for which she has carried them. This however is a claim not founded on the charterparty, but on a contract which the law generally (as before explained) *implies* in every case where a service has been rendered, viz. that the party who consents to take the benefit of it, shall pay in respect thereof as much as it is reasonably worth (*r*).

In concluding this chapter, it may be proper to advert, briefly, to the subject of *debt*, which is one closely connected with that of contract; a debt being a legal relation or predicament which frequently arises out of a contract, and is in turn sometimes the basis upon which a contract

(*q*) *Christie v. Lewis*, 2 Brod. & Bing. 410; *Horncastle v. Farran*, 3 Barn. & Ald. 497; *Saville v. Campion*, 2 Barn. & Ald. 503.

(*r*) See *Shack v. Anthony*, 1 Mau. & Sel. 573; *Pinder v. Wilks*, 5 Taunt. 512; *Vlierboom v. Chapman*, 13 Mee. & W. 220.

is founded by implication of law. For in general, whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other—as in the case of a bond for payment of money, or an implied promise to pay for goods supplied so much as they shall be reasonably worth,—a debt is then said to exist between these parties; while, on the other hand, if the demand be of uncertain amount,—as where an action is brought against a bailee, for injury done through his negligence to an article committed to his care,—it is described, not as a *debt*, but a claim for *damages* (*s*). As debts may thus arise out of contracts, and the contract may be either with or without specialty, so they are variously denominated in these several cases, as *specialty debts*, or *debts by simple contract* (*t*). They may arise, however, not only by deed or simple contract, but by *matter of record* (*u*); and in that case receive their designation accordingly, as *debts of record*; though they are also properly described in this case, as well as where they accrue by deed, as *specialty debts*. A debt of record is a sum of money which appears to be due upon the evidence of a court of record: thus it may be due upon a *statute merchant* or *statute staple* (terms explained in a former volume), or upon a *recognizance* (*x*); which is an obligation of record, entered into before some court or magistrate duly authorized, whereby the party bound acknowledges that he owes to the queen, or a private plaintiff, (as the case may be,) a certain sum of money, with condition to be void, if he shall do some particular act,—as if he shall appear at the assizes, keep the peace, pay a certain debt, or the like (*y*).

(*s*) Blackstone (vol. ii. p. 464) speaks of debt as one of the species of contracts; but this conveys no accurate idea of the meaning of the term. It is not a contract, but may be the result of a contract.

(*t*) Vide sup. p. 54.

(*u*) As to records, vide sup. vol. I.

p. 47.

(*x*) 2 Bl. Com. 465. As to statutes merchant and staple, vide sup. vol. I. p. 309.

(*y*) Bl. Com. ubi sup.; Bro. Ab. tit. Recognizance, 24. When recognizances are forfeited, they are *estreated* (that is, extracted or taken

Another species of debt by record, is that upon a *judgment*; which is, where any sum is adjudged to be due from one party to the other, in an action in a court of record; whether that sum was originally liquidated so as to constitute a *debt* between them, or was fixed and ascertained for the first time by the verdict of a jury, the original claim having been in the nature of *damages* (*z*).

The case of a judgment for a certain sum by way of damages affords, it will be observed, an instance of a debt arising independently of contract. But the instance is not a solitary one; for it may be laid down generally, that whenever a man is subject to a legal liability to pay a sum of money to another, he is said to owe him a *debt* to that amount. Thus, if by act of parliament a penalty be annexed to some particular offence, and it be made recoverable by the first informer, any person committing the offence will become indebted in the amount of the penalty to the first informer, as soon as the information is laid (*a*). It deserves remark, however, that when debts thus arise, independently of contracts, contracts may, on the other hand, arise out of them. For a man may make an actual promise to pay a debt thus created, or, in the absence of express promise, an implied one may arise by construction of law. Yet this is subject to exception in the case of a debt created by a judgment—for a debt like this, being of record, is of such superior solemnity as to merge all simple contracts (whether express or implied) in respect of the same subject-matter (*b*).

out from among the other records) and sent up to the Court of Exchequer, there to be enforced (see 22 & 23 Vict. c. 21, s. 28). But recognizances forfeited and ordered to be estreated by a court of *quarter sessions*, or of *gaol delivery*, are levied by the sheriff and returned by the clerk of the peace to the lords of the Treasury. See Dickenson's *Quarter Sessions* (6th ed.), pp. 110, 994; et

post, bk. VI. ch. XVII.

(*z*) As to *judgments* in general, vide post, bk. V. c. X.

(*a*) As to the power of the Crown to remit penalties under 22 Vict. c. 32, vide post, bk. VI. c. XXV.

(*b*) As to the merger of a simple contract, by an engagement to the same effect by *deed*, vide sup. vol. I. p. 482.

CHAPTER VI.

OF TITLE BY BANKRUPTCY.



THE property of a bankrupt is, by the statute law, made liable to be divested from him and distributed among his creditors at large. Their title to such property is consequently *by bankruptcy*, and though reserved for this period of the work, it relates, it is to be observed, not merely to the personal estate of the debtor, but also to his lands, tenements, and hereditaments; yet, as in practice it principally affects his personalty, we have deemed it expedient to pass over this title in that part of our disquisition which turned on the title to things *real*, and to reserve its discussion till the present place (*a*).

The foundation of the law of bankruptcy in this country is a statute of 34 & 35 Hen. VIII. c. 4, which was pointed at persons who should—in the language of that day—*make bankrupt*; and it more particularly described them as those “who obtain other men’s goods and then suddenly flee to parts unknown, or keep their houses and there consume their substance, without paying their debts:” and it proceeded to direct, that, upon every complaint in writing concerning the premises made by any parties to the Lord Chancellor or other dignitaries therein mentioned, the bodies of the offenders, and their lands, goods and chattels, should be ordered by their wisdom and discretion, for payment of all the creditors rateably, according to the quantity of their debts. The jurisdiction created by this statute for correction of the abuses which it describes was one unknown to the common law; and it was soon afterwards followed by another statute in further

(*a*) Vide sup. vol. I. p. 386, n. (*g*).

development of the new system. This was the statute 13 Eliz. c. 7, which provided that the offences which it particularized, when committed by persons using the trade of merchandise, should cause them to become bankrupts, and empowered the Lord Chancellor, by commission under the great seal, to appoint discreet persons of his choice, who should proceed against the bankrupts, upon principles of which it will suffice to say, that they were similar to those which the statute of Hen. VIII. had introduced. And so far every thing was in favour of the creditor; for the bankrupt being in those days considered as a criminal could naturally expect no favour at the hands of the legislature (*c*): but at length it appeared harsh to strip a man of all his resources, without relieving him at the same time from his difficulties; and by 4 Anne, c. 17, it was consequently provided, in imitation probably of the Roman law of *cessio* (*d*), that a bankrupt trader, who had thus been compelled to surrender the whole of his effects, and had in all matters conformed to the law of bankruptcy, should be entitled to his discharge from all further liability for the debts theretofore contracted.

The bankrupt law as thus constituted was thought to adapt itself so wisely to all the objects of a sound policy, that it was soon extended to many additional cases. The predicament of bankruptcy was made by later statutes to attach to a trader (if any of his creditors thought fit to proceed for that purpose), on his committing certain specified acts, some of which were not direct frauds as those particularized in the earlier statutes, but afforded only an inference of intention to evade, or inability to

(*c*) "In this spirit," says Blackstone, (vol. ii. p. 472,) "we are told by Sir E. Coke, that we have fetched as well the name as the wickedness of *bankrupt* from foreign nations."

(*d*) "The law of *cessio*," remarks Blackstone, (*ubi sup.*) was

"introduced by the Christian emperors; and by it, if a debtor ceded or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, *omni quoque corporali cruciatus semoto.*" (See Cod. 7, 71 per tot.; Inst. 4, 6, 40.)

make, payment to his creditors; and at length not only were debtors other than traders made liable to it, but also any debtor (whether a trader or not) was enabled to institute proceedings against himself at his own instance, without the interference of any creditor, with the view of becoming a bankrupt, and thus obtaining a discharge from his debts and liabilities (*e*). By another alteration, also, of the bankrupt law, (which was originally entrusted to commissioners appointed by the Lord Chancellor, and acting for each case separately,) it came at length to be administered in a court called the “Court of Bankruptcy,” established for all bankruptcies arising within the metropolitan bankruptcy district (*f*).

The statutes of Henry, Elizabeth and Anne above referred to, and some subsequent Acts on the same subject, were repealed in the time of George the fourth (*g*), but the system then established in their place was, in its turn, abandoned; and in the course of the present reign, several attempts have been made by the legislature to frame satisfactory provisions for the administration of this branch of our law (*h*). Of these it will be sufficient for our purpose to consider the existing scheme, which will be found

(*e*) See 24 & 25 Vict. c. 134, s. 86.

(*f*) Afterwards there were also *district* courts of bankruptcy for the purpose of country bankruptcies; but these were abolished by the Bankruptcy Act, 1869, and (by the same statute) country bankruptcies are directed to be prosecuted in the *county* court within whose “bankruptcy” district (which is not always co-terminous with its ordinary district) the bankrupt resides or carries on his business. On the other hand, the London bankruptcy district comprises the city of London and the districts of all the ten metropolitan county courts, none of which have any jurisdiction in bankruptcy. (32 &

33 Vict. c. 71, s. 60.) Upon the Judicature Act, 1873, coming into operation on 2nd November, 1874, all the jurisdiction of the London Court of Bankruptcy, will be transferred to the High Court of Justice thereby established, and assigned to the Exchequer division of that court. (36 & 37 Vict. c. 66, ss. 3, 34.)

(*g*) See 6 Geo. 4, c. 16.

(*h*) These were contained chiefly in 5 & 6 Vict. c. 122; 12 & 13 Vict. c. 106 (The Bankruptcy Act, 1849); 17 & 18 Vict. c. 119 (The Bankruptcy Act, 1854); 24 & 25 Vict. c. 134 (The Bankruptcy Act, 1861); 25 & 26 Vict. c. 99, and 31 & 32 Vict. c. 104.

chiefly in the 32 & 33 Vict. c. 71, (“The Bankruptcy Act, 1869,”) together with the rules made under the authority of that Act (*i*). And we may premise this observation,—that upon every court having jurisdiction in bankruptcy as now established there has been conferred a general power of deciding all questions of priorities and all questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy, and which it may be deemed by the court necessary or expedient to decide for the purpose of doing complete justice or making a complete distribution of property in any such case; and in the execution of its powers, it shall not be subject to be restrained by the order of any other court (*j*).

In proceeding to take some view of the system now in force, we shall first of all consider, *who is capable of being bankrupt*; secondly, *under what circumstances and in what manner he is adjudicated bankrupt*; thirdly, *the proceedings which take place after adjudication*; and fourthly, *the effect of the bankruptcy on his estate*. We shall conclude by giving some account of a *debtor’s petition for liquidation*,—a mode of proceeding which formed no part of the original law of bankruptcy, but has now become closely connected with it.

We shall consider, then,

I. Who is capable of being bankrupt.

This is a predicament which has always been and still is applicable to none but *debtors*, but which is applicable to them universally if they are traders, and as the law now stands is applicable to them in many cases, whether they are traders or not. But here the questions arise, who, within the meaning of the bankrupt law, is a “debtor,”

(*i*) See General Rules, dated 1 January, 1870, and 7 July, 1871. See also 32 & 33 Vict. c. 62 (The Fraudulent Debtors Act, 1869), and 32 & 33 Vict. c. 83, repealing enactments inconsistent with the

Bankruptcy Act, 1869.

(*j*) 32 & 33 Vict. c. 71, s. 72. There is however an *appeal* from its decisions, as to which vide post, p. 163.

and who is a “trader”? Upon the first of them it will be sufficient to say, that the term debtor has the same sense in bankruptcy as under the general law, and that it imports a party bound (at law or in equity) to pay another a certain and liquidated sum of money (*k*). But upon the meaning of the word trader, so far as the bankrupt law is concerned, the answer is, that, to arrive at it, it is necessary to refer to the Bankruptcy Act, 1869. “For the purposes of this Act” it is provided, (32 & 33 Vict. c. 71, s. 4,) that “the term ‘trader’ shall mean the several persons in that behalf mentioned in the first schedule to the Act,”—that is to say, generally, such persons as use “the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail: and persons who either for themselves, or as agents or factors for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the workmanship or the conversion of goods or commodities” (*l*). But besides these, persons engaged in the other particular employments mentioned in a note below, are enumerated as traders in the schedule above referred to, and are liable to become bankrupt as such (*m*).

(*k*) Vide sup. p. 143. It is to be observed, however, that the bankrupt law is applicable to many cases where the amount due from a party is not yet *ascertained*. But in these the bankruptcy court may cause such amount to be ascertained (vide post, p. 172), and when this is done, the bankrupt becomes a debtor according to the above definition.

(*l*) 32 & 33 Vict. c. 71, Sched. I. See as to this general definition *Paul v. Dowling*, Moo. & Mal. 263; *Heane v. Rogers*, 9 Barn. & Cress. 577; *Gibson v. King*, 10 Mee. & W. 667; *In re Cleland*, Law Rep., 2 Ch. App. 466. It would seem, the

trading must have continued down to the time when proceedings in bankruptcy were taken. See *Ex parte Baily*, *In re Jecks*, 41 L. J. (N. S.) Bank. 1.

(*m*) These are as follows:—Alum makers; apothecaries; auctioneers; bankers; bleachers; brokers; brick-makers; builders; calenderers; carpenters; carriers; cattle or sheep salesmen; coach proprietors; cow-keepers; dyers; fullers; keepers of inns, taverns, hotels or coffeehouses; lime burners; livery stable keepers; market gardeners; millers; packers; printers; sharebrokers; shipowners; shipwrights; stockbrokers; stock-jobbers; victuallers; warehousemen;

There is, however, in the same schedule a proviso that no *farmer, grazier, common labourer, or workman for hire*, nor *member* of any partnership association or company which cannot be adjudged bankrupt under the Act, (that is to say, any partnership, association or company corporate or registered under the Companies Act, 1862,) shall be deemed to be, as such, a trader for the purposes of the Act (*o*); though, on the other hand, an ordinary partnership may be made bankrupt collectively, or any one or more members of the firm separately (*p*). It has also been long since settled by decisions in bankruptcy, which were founded on arguments apparently as available under present as under former enactments, and which we may therefore assume to be still binding,—that, to bring a man under the definition of a trader liable to be made bankrupt as such, his trading must be one that is carried on either within, or at least to or from, the realm (*q*); and that in the interpretation of the words *buying* and *selling*, buying only, or selling only, will not suffice, but there must be both buying and selling, and also the endeavour to obtain a livelihood thereby (*r*); and that one single act of buying and selling will not do, at least if unconnected with any intention of general dealing (*s*). Also that the trading will not suffice if it consists of buying and selling

wharfingers; persons using the trade or profession of a scrivener or receiving other men's monies or estates into their trust or custody; persons insuring ships or their freight or other matters against the perils of the sea. "Brokers" includes *pawnbrokers*, (Rawlinson v. Pearson, 5 B. & Ad. 124,) and *shipbrokers*. (Pott v. Turner, 6 Bing. 702.) As to "builders," see Stuart v. Sloper, 3 Exch. 700.

(*o*) 32 & 33 Vict. c. 71, s. 5. It will be remarked that these incapacities have no application to

the case of a debtor himself filing a petition for *liquidation*, in manner hereinafter explained.

(*p*) Sect. 100.

(*q*) See *Ingliss v. Grant*, 5 T. R. 530; *Allen v. Cannon*, 4 Barn. & Ald. 418.

(*r*) 2 Bl. Com. p. 476; and see *Sutton v. Weeley*, 7 East, 442; *Cro. Car.* 31; *Skin.* 292.

(*s*) Bl. Com. ubi sup. See *Summerset v. Jarvis*, 3 Brod. & B. 2; *Ex parte Blackmore*, 6 Ves. 3; *Ex parte Salkeld*, 3 M., D. & D. 175.

only under particular restraints or for particular purposes; as where the buying is of provisions of war, and the selling, the disposal of the surplus and refuse thereof (*t*), or if a schoolmaster buy books and sell them to his scholars (*u*). And, on the other hand, that a trading carried on by a clergyman *will* suffice, though trading by one in holy orders is forbidden by the law (*x*). Moreover, though an unmarried woman of full age may be made bankrupt as a trader, a *feme covert* can be so made bankrupt only where she carries on business as a sole trader, according to a custom—as of London (*y*); or where she has traded on property which under the Married Women's Property Act, 1870, has become absolutely her own (*z*); and an infant is altogether incapable of being made a bankrupt (*a*). We may conclude the present head, by remarking that a person having privilege of parliament (in either house) is not thereby protected from the liability to be made a bankrupt (*b*); and that aliens, denizens, and persons naturalized, are amenable to the law of bankruptcy, equally with natural-born subjects (*c*).

II. Having thus considered who is capable of being a bankrupt, we are to inquire, secondly, under what circumstances and in what manner he is adjudicated such.

In order, then, to support an adjudication of bankruptcy it is essential that the debtor shall have committed

(*t*) See *Newton v. Trigg*, 1 Salk. 110; *Skin. 292*; *Gibson v. Thompson*, 3 Keb. 451.

(*u*) See *Valentine v. Vaughan*, Peake, 76.

(*x*) See *Ex parte Meymott*, 1 Atk. 196. The existing enactments, by which clergymen are in general prohibited from trading, are 1 & 2 Vict. c. 106, ss. 28—30; and 4 & 5 Vict. c. 14.

(*y*) 2 Bl. Com. 477; and see *Ex parte Franks*, 7 Bing. 762.

(*z*) See 33 & 34 Vict. c. 93, ss. 1, 11.

(*a*) Bl. Com. ubi sup.; see *Belton v. Hodges*, 9 Bing. 365.

(*b*) 32 & 33 Vict. c. 71, ss. 120—124; *Ex parte Pooley*, In re Russell, Law Rep., 7 Ch. App. 519. As to bankrupt *peers*, see 34 & 35 Vict. c. 50. As to the liability of a peer to be made a bankrupt prior to this Act, see *Newcastle v. Morris*, Law Rep., 4 Eng. & Ir. App. Ca. 661.

(*c*) See *Allen v. Cannon*, 4 Barn. & Ald. 418.

one or more of the following *acts of bankruptcy* within six months before the presentation of the petition (*d*): viz., That he has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally (*e*). That he has, in England or elsewhere, made a *fraudulent* conveyance, gift, delivery or transfer of his property, or of any part thereof. That he has with intent to defeat or delay his creditors, done any of the following things, viz., departed out of England; or, being out of England, remained out of England; or, *being a trader*, departed from his dwelling-house or otherwise absented himself; or begun to keep house; or suffered himself to be outlawed. That he has filed in the prescribed manner, in the court having jurisdiction in bankruptcy, a declaration admitting his inability to pay his debts (*f*). That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than fifty pounds, has *in the case of a trader* been levied by seizure and sale of his goods (*g*). That the creditor presenting the petition has served on the debtor in the prescribed manner a debtor's summons, requiring him to pay a sum due of an amount not less than fifty pounds, and the debtor *being a trader* has for the space of seven days (or *not being a trader* has for the space of three weeks), succeeding the service of such summons, neglected to pay such sum or to secure or compound for the same, if required so to do by the court (*h*).

(*d*) 32 & 33 Vict. c. 71, s. 6.

(*e*) See as to this act of bankruptcy, Ex parte Lückes, In re Wood, 41 L. J. (N. S.) Bank. 21. The conveyance or assignment need not, for this purpose, be *stamped* (see Ex parte Wensley, 1 De Gex, J. & S. 273; Ponsford v. Walton, Law Rep., 3 C. P. 167). As to the term "property," see the definition given in the 4th section of the 32 & 33 Vict. c. 71.

(*f*) Accordingly it has been held that it is an act of bankruptcy to file a *petition for liquidation* (Ex parte Duignan, In re Bissell, Law Rep., 6 Ch. App. 605).

(*g*) See Ex parte Rayner, In re Johnson, Law Rep., 7 Ch. App. 325.

(*h*) See Ex parte Johnson, Law Rep., 5 Ch. App. 741; Ex parte O'Loughlen, ib. 6 Ch. App. 406; Ex parte Ellis, In re Kain, ib. 602; Ex

With respect to the acts of bankruptcy above enumerated, which have reference to the execution of a conveyance or assignment, it may be convenient here to remark that the character of the transaction, as being innocent or fraudulent and such as will support an adjudication, is to be determined in reference exclusively to the creditors of the debtor—their protection only and not that of the general public being within the scope and object of the bankruptcy law: and that any transfer is fraudulent in this point of view which is void under the statute 13 Eliz. c. 5 (*i*); or which substantially conveys the trader's whole property in consideration of a pre-existing debt (*k*); or even a portion of his property in consideration of such a debt, if made *voluntarily* and *in contemplation of bankruptcy*, or if it otherwise have the effect of defeating or delaying creditors (*l*).

Such being the different acts of bankruptcy, we are next to advert to the manner of obtaining an adjudication (*m*). And this is by filing a petition in the court, praying that the debtor be adjudged a bankrupt, and alleging as the ground one or more of the acts above set forth (*n*). Such

parte Wier, *ib.* 875; *ib.* 7 Ch. App. 319. In reference to this act of bankruptcy, notice may be taken of the 32 & 33 Vict. c. 71, s. 86, and 33 & 34 Vict. c. 76, providing for the arrest of a debtor summoned, or against whom a petition has been presented, if there be reason to believe that he is about to abscond and go abroad (see *Ex parte Lopez*, *In re Brelaz*, Law Rep., 6 Ch. App. 894).

(*i*) *Vide sup.* vol. I. p. 498. See *Billiter v. Young*, 6 El. & Bl. 17.

(*k*) *Worsley v. De Mattos*, 1 Burr. 467. See *Ex parte Hawker*, *In re Keeley*, Law Rep., 7 Ch. App. 214; *In re Wood*, *ib.* 302; *Ex parte Fisher*, *In re Ash*, *ib.* 636.

(*l*) *Smith v. Cannan*, 2 Ell. & Bl. 35; 1 *Smith's Leading Cases*,

note to *Twyne's case*. See the cases cited in support of the above propositions in *Davis on County Courts*, vol. ii. p. 228.

(*m*) Under the previous bankruptcy Acts, the acts of bankruptcy enumerated were more numerous and complicated.

(*n*) As to the form of petition, see Reg. Gen. Schedule of Forms, No. 10. Originally, a *commission* issued (*vide sup.* p. 147), and afterwards the proceedings in bankruptcy commenced by a *fiat*, viz. a power under the Lord Chancellor's signature addressed to the Court of Bankruptcy, authorizing the proceedings to be taken. And now, instead of obtaining a *fiat*, the course is to file a *petition* to the

petition may be filed by any single creditor whose debt amounts to 50*l.* or upwards (*m*),—or by any two or more creditors whose debts in the aggregate amount to 50*l.* or upwards (*n*); and these are called the *petitioning creditor* or *creditors*. The petition, which must be on oath (*o*), and served on the debtor (*p*), is to be filed by the creditor in the court within the bankruptcy district of which the debtor resides or carries on business at the time of filing such petition (*q*); and it prays that the debtor may be adjudicated a bankrupt; and the proceedings upon it commence by giving proof of the petitioning creditor's debt, of the trading (where the trading is material), and of the act of bankruptcy; but, as already stated, no act of bankruptcy will suffice for this purpose if committed more than six months before the petition (*r*).

court having jurisdiction in bankruptcy, without application to the Lord Chancellor.

(*m*) It is observable that the debt may now be a liquidated sum due either at law or in equity. Prior to the Bankruptcy Act of 1869, a mere *equitable* debt would not support a petition (Ex parte Blencowe, Law Rep., 1 Ch. App. 393). On the other hand, the debt must be one in existence at the time of the act of bankruptcy (see Ex parte Hayward, In re Hayward, Law Rep., 6 Ch. App. 546); and if *secured*, the security must be surrendered for the benefit of the general creditors (32 & 33 Vict. c. 71, ss. 6, 40).

(*n*) Sect. 6.

(*o*) Reg. Gen., rr. 29, 30.

(*p*) 32 & 33 Vict. c. 71, s. 8. See Gen. Rules, rr. 60—66.

(*q*) 32 & 33 Vict. c. 71, s. 59. Under the system now in use, the petition is filed in the London Court of Bankruptcy, or in the county

court having jurisdiction in bankruptcy, as the case may require. But upon the commencement of the Judicature Act, 1873 on the 2nd November, 1874, it will be filed either in the county court, or (within the metropolitan bankruptcy district) in the Exchequer division of the High Court of Justice by that Act established (36 & 37 Vict. ss. 3, 34).

(*r*) 32 & 33 Vict. c. 71, s. 8, Gen. Rules, rr. 37—48, vide sup. p. 152. At any time after the presentation of a petition the court, by section 13, may make an order *restraining* proceedings against the debtor at law or equity (see Ex parte Anderson, Law Rep., 5 Ch. App. 473; Ex parte Mills, In re Manning, ib.; 6 Ch. App. 594; Ex parte Hughes, In re Browne, ib., 12 Eq. Ca. 137), or appointing a receiver or manager of his property (see Ex parte Isaac, In re De Vecchj, Law Rep., 6 Ch. App. 58.)

An adjudication is then made by the court that the party is bankrupt, supposing the proofs to be thought sufficient for the purpose ; but the debtor is nevertheless at liberty to show sufficient cause against it, supposing any such cause to exist (*s*). But should no such cause be shown, then the order of the court making the adjudication is forthwith published in the London Gazette, and such other paper or papers as may be prescribed ; and the production of a copy of the Gazette, containing a copy of such order, shall be conclusive evidence of the debtor having been adjudged a bankrupt and of the date of the adjudication (*t*).

III. Having now shown under what circumstances and how a debtor is adjudicated bankrupt, we have next to advert to the proceedings which take place after adjudication. These may be said to commence at the date of the adjudication, and to end with the bankrupt's obtaining his *order of discharge*, (either after the close or during the continuance of the bankruptcy,) a matter to which we shall hereafter refer with more particularity ; and during this interval, or even afterwards, the court may summon before it the bankrupt (or his wife), or any other person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to him, or thought capable of giving information as to him, his trade, dealings or property ; and, in case of such person not appearing, (having no lawful impediment allowed by the court,) may direct him to be arrested and brought before it ; and, on his appearing,

(*s*) It may be here observed that a judge in bankruptcy has (under 32 & 33 Vict. c. 71, s. 67, and Gen. Rules 2—4) power to delegate to the registrar such of the powers vested in him under the Bankruptcy Act as it may be expedient to delegate. His power to commit a person for

contempt cannot, however, be delegated. Adjudication and a variety of other matters in bankruptcy may be disposed of either in open court or at *chambers* (see Gen. Rules, 5—8).

(*t*) 32 & 33 Vict. c. 71, s. 10.

voluntarily or otherwise, may *examine* him either by word of mouth or by written interrogatories, concerning the bankrupt, his dealings or property (*t*).

The point that next requires our attention is, that, as soon as conveniently may be after the order of adjudication has been made and advertised as already mentioned, the court is to summon a general meeting (usually called the *first meeting*) of the creditors, of which ten days' notice is given in the London Gazette (*u*), and (in country cases) in a local paper; and at such meeting the creditors, by resolutions then passed, proceed to appoint some creditor or other person to fill the office of *trustee* of the bankrupt's property (*x*); to appoint from among the creditors fit persons, not exceeding five in number, who shall form a *committee of inspection*, for the purpose of superintending the administration by the trustee of the bankrupt's property (*y*); and, if they think proper, to give directions as to the manner in which the property is to be administered by the trustee (*z*). This meeting is, as the general rule, presided over by the registrar of the court (*a*), and in this officer vests the property of the bankrupt from the date of the adjudication until some other trustee than himself be

(*t*) 32 & 33 Vict. c. 71, ss. 96, 97.

(*u*) Sect. 14, Rule 89. The place of meeting is usually in the town where the court sits, but on due cause it may be held elsewhere (Rules 87, 88).

(*x*) More than one trustee may be appointed (32 & 33 Vict. c. 71, s. 83). As to the consequences of the creditors failing to appoint a trustee, see Sect. 84, and *Ex parte English Joint Stock Bank*, *In re Finney*, Law Rep., 6 Ch. App. 79.

(*y*) As to the committee of inspection, see also 32 & 33 Vict. c. 71, s. 83.

(*z*) Sect. 14. It is, however, competent to the creditors to leave the

appointment of the trustee to the committee of inspection; but if the creditors appoint him they are to determine as to the *security* he is to give. If the trustee have any directions given to him at the first meeting, it is his duty to conform to them, unless the court for some just cause orders otherwise. (*Ibid.*)

(*a*) Sect. 16. In the unavoidable absence of the registrar, the meeting may elect a chairman. As to the formalities required to pass a resolution at a general meeting of creditors, see *Ex parte Orde*, *In re Horsley*, Law Rep., 6 Ch. App. 381.

appointed (*b*). At this or any other meeting, or at any time after the adjudication, any creditor may *prove his debt* by an affidavit which prior to the appointment of the trustee is sent to the registrar of the court, and after such appointment to the trustee himself; and no person is entitled to vote as a creditor at any meeting unless he has first duly proved his debt in the prescribed manner (*c*).

The duty of the creditors' trustee, thus chosen, is generally to exercise his own discretion in the management of the estate until the bankruptcy is closed and he has obtained his release (*d*). From time to time, however, he may summon general meetings of the creditors for the purpose of ascertaining their wishes, and he may also apply to the court for directions in relation to any particular matter arising under the bankruptcy. He is also, as the bankruptcy goes on, to consult the committee of inspection as to his proceedings; and, in addition to the above general direction as to his duty, the trustee has, by the Bankruptcy Act, 1869, power specifically given to him to do the different things enumerated in the note below (*e*).

(*b*) 32 & 33 Vict. c. 71, s. 17. Whenever there is no other trustee at any time during the continuance of the bankruptcy, the registrar of the court acts as such (Sect. 83).

(*c*) Sect. 16. As to proof by a secured creditor, see *Ex parte Brett*, *In re Howe*, *Law Rep.*, 6 Ch. App. 838.

(*d*) As to the release of the trustee see 32 & 33 Vict. c. 71, s. 51.

(*e*) These are (*of his own authority*)—to receive proofs; to carry on the bankrupt's business; to bring and defend actions; to deal with bankrupt's estates in tail; to exercise powers of attorney and other instruments; to sell the bankrupt's property and book debts; to give receipts for money paid to the credit of the estate; to prove debts and receive dividends on behalf of the bank-

rupt; and to appoint the bankrupt to manage and carry on his business for the benefit of his creditors. Moreover (*with the sanction of the committee of inspection*) he may mortgage the bankrupt's property; refer to arbitration or compromise debts owing to bankrupt; compromise or arrange claims against his estate; compromise or arrange other incidental claims, and divide among the creditors property which cannot advantageously be sold. (32 & 33 Vict. c. 71, ss. 25—27.) He may also (*with the consent of the creditors, testified by a resolution passed at a general meeting*) make an allowance to the bankrupt out of his property for his support during the continuance of the bankruptcy (Sect. 38).

The next step in the proceedings with respect to the bankrupt himself is, that the court appoints a day not later than forty days from the date of the first meeting of creditors, (notice of such day being given in the London Gazette, and in such newspapers as the court shall direct,) for the bankrupt to *pass his public examination* in open court,—any previous examinations to which he may have been required to submit being usually before the registrar at chambers (*c*); but the court has power to enlarge the time appointed for such public examination, or, from time to time, to adjourn the same (*d*).

This public examination is upon the *statement of his affairs*, which the bankrupt is required to produce to his creditors at their first meeting: it being his duty to aid to the utmost of his power in the realization of his property, and the proper distribution of the proceeds.

Upon the day appointed for his public examination, the bankrupt is bound himself to attend the court; and, at the close of the sitting (or, if adjourned, when he is permitted to pass), he must sign a memorandum, stating on oath that the statement of accounts he has filed contains a just and true disclosure and discovery of all his estate and effects, both real and personal, whatsoever and where-soever; and, also, that he has delivered up to his trustee all such parts of his goods, wares, merchandise, money, estate and effects, and all books, papers and writings relating thereto, as are at the time of such examination in his custody, possession, or power; and, further, that he has not, with an intent to defraud his creditors, removed,

(*c*) Besides having to submit to examination, the bankrupt is also required to attend the meetings of his creditors, to wait on the trustee, execute necessary powers and instruments, and generally to do every thing in relation to his property and the distribution of its proceeds amongst his creditors which may

reasonably be required by the trustee or ordered by the court (32 & 33 Vict. c. 71, s. 19).

(*d*) Sect. 19; Gen. Rules, rr. 96, 111. The bankrupt's public examination was formerly known as his *last examination*, but this term has become disused.

concealed, embezzled, or destroyed any part of his estate, real or personal, nor any books of accounts, papers or writings relating thereto; and he must add to such statement any other special matter which the nature of his case may require (*e*).

It is next to be observed that a bankrupt (or a person whose affairs have been liquidated by arrangement as hereinafter explained) will be guilty of a misdemeanor, and under the provisions for the punishment of fraudulent debtors contained in the Debtors Act of 1869 (32 & 33 Vict. c. 62), be liable, on conviction at the assizes or quarter sessions, to be imprisoned for any time not exceeding *two years*, with or without hard labour, if he shall (*with intent to defraud*) be guilty of any of the things following (*f*).

1. If he does not, to the best of his knowledge and belief, discover to his trustee all his property, and the mode in which he has disposed of any part thereof, except in the ordinary way of his trade (if any), or in the ordinary expense of his family. 2. If he does not deliver up all such part of his property as is in his custody or control, and which he is required by law to deliver up. 3. If he does not deliver up all books, documents, papers and writings in his custody or control, which relate to his property or affairs. 4. If, after the presentation of a petition, or within four months before, he conceals any part of his property to the value of 10*l.* or upwards, or conceals any debt due to or from him. 5. If, within the same period, he removes any part of his property to the value of 10*l.* or upwards. 6. If he makes any material omission in any statement relating to his affairs. 7. If, knowing or believing that a false debt has been proved against his estate, he fails for the period of a month to inform his

(*e*) Gen. Rules, r. 45.

(*f*) Prior to this act offences against the bankrupt laws could not be tried at quarter sessions, being

excluded from their jurisdiction by 5 & 6 Vict. c. 38. But see now 32 & 33 Vict. c. 62, s. 19.

trustee thereof (*d*). 8. If, after the presentation of a petition, he prevents the production of any book or document affecting or relating to his property or affairs. 9. If, after the presentation of a petition or within four months before, he conceals, destroys, mutilates or falsifies (or is privy thereto) any book or document affecting or relating to his property or affairs. 10. If, within the same period, he makes, or is privy to the making of, any false entry in any such book or document. 11. If, within the same period, he parts with, alters, or makes any omission (or is privy to the same) in any such document. 12. If, after presentation of a petition, or at any meeting of his creditors held within four months before, he attempts to account for any part of his property by fictitious losses or expenses. 13. If, within four months next before a petition, he, by false representation or other fraud, has obtained property on credit, and has not paid for the same. 14. If, within the same period, he, *being a trader*, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same. 15. If, within the same period, and *being a trader*, he pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit, and has not paid for. 16. If he is guilty of any false representation or other fraud, for the purpose of obtaining the consent of his creditors, or any of them, to any agreement with reference to his affairs, or his bankruptcy or liquidation (*e*).

Moreover, any such bankrupt or person whose affairs have been liquidated shall be deemed guilty of a misdemeanor, and liable on conviction to imprisonment for *one*

(*d*) By 32 & 33 Vict. c. 62, s. 14, any *creditor* who wilfully and with intent to defraud makes a false claim, or any proof declaration or statement of account untrue in any

material particular, is in like manner guilty of a misdemeanor and punishable by a year's imprisonment with or without hard labour.

(*e*) Sect. 11.

year, with or without hard labour, who shall, *with intent to defraud his creditors*, do any of the following things:—

1. If, in incurring any debt or liability, he has obtained credit under false pretences, or by means of any other fraud.
2. If he has made, or caused to be made, any gift, delivery, or transfer of, or any charge on, his property.
3. If he has concealed or removed any part of his property within two months before the date of any unsatisfied judgment, or order for payment of money, obtained against him (*f*). And in the following case he will be guilty of *felony*, and be liable to two years' imprisonment with or without hard labour, namely: if, after the presentation of the petition (or four months before) he shall, with intent to defraud his creditors, quit (or attempt or make preparation to quit) England, and shall take with him (or attempt to take) any part of his property to the amount of 20*l.* or upwards, which ought by law to be divided among his creditors (*g*).

To every bankrupt, however, who conforms in all points to the direction of the statutes, the law makes full amends for all this rigour and severity: for, after passing through his public examination, he is entitled (but, unless his bankruptcy has closed, only with the assent of his creditors testified by a special resolution) to apply for an *order of discharge* (*h*); and on obtaining this (which, if granted, must be in writing and advertised in the London Gazette) he is set free from all debts and liabilities whatever which are proveable under the bankruptcy—save only such as were incurred or forborne by means of fraud or breach

(*f*) 32 & 33 Vict. c. 62, s. 13.

(*g*) Sect. 12. As to an attempted flight, vide sup. p. 152, n. (*h*).

(*h*) 32 & 33 Vict. c. 71, s. 48. Instead of an *order of discharge*, the bankrupt at one time obtained his discharge by the allowance of a *certificate of conformity*, which certificate varied in its character according to the circumstances of

the case. For if, in the opinion of the court, the bankruptcy arose from “unavoidable losses and misfortunes,” it was awarded as of the *first class*; if not wholly from such losses and misfortunes, of the *second class*; if not arising at all from such losses and misfortunes, then of the *third class* (see 12 & 13 Vict. c. 106, s. 199, Sched. Z.).

of trust, or are due to the crown, or incurred by any offence against the revenue laws, or as bail for any person committing such offence (*i*); and he is moreover entitled to enjoy, free from the claims of his creditors, all future acquisitions of property; so that, in the language often applied to the case of the bankrupt's discharge under former statutes, "he becomes a clear man again" (*k*).

But the bankrupt is not, as a matter of course, entitled either to pass his public examination or to obtain his order of discharge; for either the trustee or any creditor who has proved may be heard in opposition, and on good cause shown the examination may be from time to time adjourned (*l*); and when allowed to pass his public examination, the bankrupt is not always enabled to obtain an order of discharge: for it is provided by the Bankruptcy Act, 1869, that such order shall not be granted unless it be proved to the court either that a dividend of not less than 10s. in the pound has been paid (or might have been paid but for the negligence or fraud of the trustee), or else that the creditors have passed a special resolution, to the effect that the bankruptcy or failure to pay such dividend has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that the discharge should be granted. And power, moreover, is given to the court to suspend or withhold altogether the order, if it should appear to it,—on the representation of the creditors made by a special resolution,

(*i*) In either of these cases the Treasury, however, may consent to the discharge (32 & 33 Vict. c. 71, s. 49).

(*k*) Under the state of the law which existed at the date of the Bankruptcy Act, 1869, a promise on the part of the bankrupt (even though in writing) was inoperative to revive a debt from which he was thus discharged. The 32 & 33 Vict. c. 71, however, does not con-

tain any such restriction, and the previous enactments on the subject were repealed by 32 & 33 Vict. c. 83. (See *Rimini v. Van Praagh*, 27 L. T. Rep. (N. S.) 540 Q. B.)

(*l*) A bankrupt, however, cannot be allowed to pass his public examination *conditionally* on his doing certain things (*Ex parte Smith*, *In re Angerstein*, Law Rep., 7 Ch. App. 662).

of the truth of which it is satisfied, or by other sufficient evidence,—that the bankrupt has made default in giving up to his creditors the property which he is required to give up; or that a prosecution has been commenced against him under any of the provisions relating to the punishment of fraudulent debtors contained in the Debtors Act, 1869, and which have been already enumerated in this chapter (*m*). There is, however, in this, as in all other bankruptcy matters, either of law or fact, an appeal given to any person aggrieved by the decision of the judge having original jurisdiction in bankruptcy (*n*).

It is further to be observed, that where a bankrupt (from one or other of the above reasons) has *failed* to obtain his discharge, then, from and after the close of his bankruptcy,—that is to say, when the court shall have made an order that the bankruptcy has closed, on being satisfied that the whole of his property, or so much of it as may be, has been realized for the benefit of his creditors (*o*),—the following consequences ensue. No portion of any debt proveable under his bankruptcy can be enforced against his property until the expiration of three years from that date (*p*); and if during that time he shall have paid to his creditors such additional sum as will, with the dividend paid out of his property during bankruptcy, make up ten shillings in the pound, he shall be entitled

(*m*) Vide sup. p. 161.

(*n*) Under the system now in force such appeal (in the case of an order made in a county court) is to the chief judge in bankruptcy, then to the Court of Appeal in Chancery, and ultimately (but only by leave of such Court of Appeal) to the House of Lords (32 & 33 Vict. c. 71, s. 71). But from the commencement of the Judicature Act, 1873 on 2nd November, 1874, the appeal will be to a divisional court of the High Court of Justice there-

by established; and thence (but only by special leave) to the Court of Appeal. (36 & 37 Vict. c. 66, s. 45.)

(*o*) 32 & 33 Vict. c. 71, s. 47.

(*p*) It may be observed, that, if any money comes to an undischarged bankrupt, it may be *arrested* by the trustee, but he cannot follow it into the hands of a third party to whom it has been paid by the bankrupt. (See *Ex parte Dewhurst*, *In re Vanloke*, Law Rep., 7 Ch. App. 185.)

then to receive his order of discharge; but, otherwise, any balance of a debt proved in the bankruptcy (but not interest thereon) shall be deemed to be a subsisting debt in the nature of a judgment debt against him, and (subject to the rights of creditors since the bankruptcy) may be enforced against any of his property; though only to the extent, and in such time and manner, as shall be directed by the court which adjudicated the debtor bankrupt, or has jurisdiction in bankruptcy in the place where such property is situated (*q*).

Thus much for the proceedings in bankruptcy which take place with respect to the bankrupt. Let us next consider,

IV. The effect of the bankruptcy on the property of the bankrupt.

We have seen that upon the order of adjudication being made, the property of the bankrupt vests immediately in the registrar of the court until a trustee is appointed, the trustee being elected by the creditors themselves at their first meeting (*r*). Now there is a provision that when his selection shall have been reported and (on his having entered into the required security) confirmed by the court, the court shall, by its *certificate of appointment*, declare such trustee to have been duly appointed (*s*). And it is also provided that, upon such appointment, all the property of the bankrupt shall forthwith pass out of the registrar and vest in the trustee (*t*). By the mere effect, then, of this appointment, the whole property of the bankrupt passes to the trustee; to which we may add, that the production of the certificate under seal of the court, is conclusive evidence of the appointment from the date of such certificate (*u*); though in all places where conveyances or assignments are required to be registered, enrolled, or re-

(*q*) 32 & 33 Vict. c. 71, s. 54. 1 C. P. 667.)

(*r*) Vide sup. p. 156.

(*t*) 32 & 33 Vict. c. 71, s. 17.

(*s*) 31 & 32 Vict. c. 71, s. 18.

(*u*) Sect. 18. See 25 & 26 Vict. c. 53, s. 80.

(See Kelly v. Morray, Law Rep.,

corded, the certificate must be registered, enrolled, or recorded accordingly (*x*). There are, however, many enactments and decisions in bankruptcy which lay down more fully and specifically the effect of the appointment of the trustee on the bankrupt's property, and to the collective operation of these it will be necessary now to direct our attention.

The trustee, then, by force of his appointment, takes for the benefit of the creditors, subject to the exceptions which will be mentioned, all the lands, tenements and hereditaments of the bankrupt (*y*),—whether situate in the United Kingdom or elsewhere within her Majesty's dominions, together with all his personal estate and effects, present and in expectancy, and wherever situate; or, more generally, all such "property" as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or which (with the exceptions about to be noticed) may be acquired by or devolve on him during its continuance (*z*); and also all powers which he is entitled to exercise for his own benefit, except the right of nomination to any vacant ecclesiastical benefice (*a*). Moreover, in certain cases, the property even of *strangers*, if found in the bankrupt's possession, vests in the trustee; it being one of the enactments of the bankrupt law (introduced to protect creditors from fraud and fallacious appearances), that

(*x*) 32 & 33 Vict. c. 71, s. 83 (8).

(*y*) It is to be noticed that the trustee takes all the *personal estate* of the bankrupt coming to him through his *wife*; and if he is entitled, through her, to a life or other interest in *real* estates, is entitled to receive the rents. But such rights of the trustee arise only where such property of the bankrupt is not settled on his wife to her separate use upon her marriage, and has not become so settled under the provisions of the Married Women's

Property Act, 1870.

(*z*) 32 & 33 Vict. c. 71, s. 15, subs. 3. The term "property" includes money, goods, things in action, land and every description of property, whether real or personal, as well as obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incidental to property as above defined. (Sect. 4.)

(*a*) Sect. 15, subs. 4. (See *Badham v. Mee*, 7 Bing. 695.)

where a bankrupt trader shall, at the commencement of the bankruptcy, have in his possession, order, or disposition, by consent and permission of the true owner, any goods or chattels whereof he, the bankrupt, was reputed owner, or whereof he had taken upon himself the sale or disposition as owner, they shall be deemed to form part of the property of the bankrupt divisible amongst his creditors (*b*). On the other hand, there passes not to the trustee any property, in respect of what the bankrupt may earn by his personal labour after the bankruptcy has commenced (*c*); nor any in respect of his right of action for a personal wrong (*d*); nor in respect of what belongs to the bankrupt in the capacity of trustee for others (*e*); or of any office that he holds of such a nature that it cannot legally be sold (*f*); nor in respect of his military, or other pay under the crown (*g*); or of the tools of his trade (if any), and the necessary wearing apparel of himself, his wife and children, to a value (inclusive of tools, apparel and bed-

(*b*) 32 & 33 Vict. c. 71, s. 15, subs. 5. "Things in action" not being trade debts are not goods and chattels within this provision (*Ibid.*). See as to this exception *Ex parte Union Bank of Manchester*, *In re Jackson*, *Law Rep.*, 12 Eq. Ca. 354. As to when goods mortgaged by bill of sale are in his order and disposition, see *Ashton v. Blackshaw*, *Law Rep.*, 9 Eq. Ca. 510; *Ex parte Homan*, *In re Vining*, *ib.*, 10 Eq. Ca. 63; *In re Broadbent*, 12 Eq. Ca. 598; *Ex parte Lewis*, *In re Henderson*, *ib.*, 6 Ch. App. Ca. 626.

(*c*) See *Elliot v. Clayton*, 16 Q. B. 581.

(*d*) See *Howard v. Crowther*, 8 Mee. & W. 601; *Beckham v. Drake*, *ibid.* 846; *Whitmore v. Gilmonr*, 12 Mee. & W. 808; *Rogers v. Spence*, 13 Mee. & W. 571.

(*e*) 32 & 33 Vict. c. 71, s. 15 (1).

(See *Paruham v. Hurst*, 8 M. & W. 43.)

(*f*) Co. B. L. 298. If the bankrupt be a *beneficed clergyman*, the trustee may apply for a sequestration of the profits of his benefice; but the sequestrator is to allow such annual sum to the bankrupt while he performs the duties, as the bishop of the diocese shall direct. (32 & 33 Vict. c. 71, s. 88.)

(*g*) Co. B. L. 299. See *Eden*, B. L. 220; *Gibson v. East India Company*, 5 Bing. N. C. 262. But, by 32 & 33 Vict. c. 71, s. 89, the court may order to be applied, in payment of the bankrupt's debts, such portion of his pay, half-pay, salary, emolument or pension as may be authorized by the chief officer of the department to which the bankrupt belongs or has belonged.

ding) of the sum of 20*l.* (*h*). Moreover, when any property of the bankrupt, acquired by the trustee, consists of land of any tenure burthened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of money, the trustee may in writing *disclaim* such property, (*i*)—whereupon the property, if a contract, shall be deemed determined from the date of the adjudication; if a lease, to have been surrendered on the same date (*j*); if shares, to have been then forfeited; and if any other species of property, to have reverted to the person entitled on the determination of the bankrupt's estate, or if there be none such in existence, then in no case shall any estate or interest therein remain in the bankrupt (*k*).

There is, however, a provision, that any person injured by the operation of this enactment, shall be deemed a creditor of the bankrupt to the extent of such injury, and may prove the same as a debt (*l*).

It is further to be observed that the appointment of the trustee has a *retrospective* relation, so that the bankruptcy shall be deemed to commence at the time the debtor committed any act of bankruptcy within twelve months next preceding the order of adjudication, so as to overreach and annul subsequent alienations and executions (*m*). This has been the principle of the bankrupt law ever since the time of Queen Elizabeth; and it prevailed at that

(*h*) 32 & 33 Vict. c. 71, s. 15 (2).

(*i*) Sect. 23.

(*j*) But the trustee cannot disclaim a lease without leave from the court, Bankruptcy Rules, 1871, No. 28. As to disclaimer of lease, see *Ex parte Llynvi Coal and Iron Co.*, In re Hyde, Law Rep., 7 Ch. App. 28.

(*k*) 32 & 33 Vict. c. 71, s. 23.

(*l*) Ibid.

(*m*) Sect. 11. As to the doctrine of *relation*, see *Cooper v. Chitty*, 1 Burr. 20; 1 W. Blackst. 65, S. C.; 2 Bl. Com. 486; *Bushell v. Boord*, 16 L. J. (Q. B.) 57; *Sims v. Simpson*, 1 Bing. N. C. 306; *Lomax v. Buxton*, Law Rep., 6 C. P. 107; *Ex parte Duignan*, Re Bissell, ib. 6 Ch. App. 605.

period, with an austerity which put wholly out of sight the consideration due to innocent parties, and the safety of commercial transactions (*m*). Even in our own days, indeed, it continued so to operate as to produce, in particular instances, results of a harsh character, until qualified by recent legislation (*n*). But by the existing law it is now satisfactorily regulated by provisions in the Bankruptcy Act, 1869. For by these, any payment to a bankrupt, or delivery of his money or goods to a bankrupt by a depositary thereof, and any contract or dealing with him, are protected,—provided the transaction was in good faith and for valuable consideration, and took place before adjudication, and without having had notice of any act of bankruptcy previously committed and available against the bankrupt for adjudication (*o*). And, further, that, provided the matter be not invalid by reason of being a *fraudulent preference* or otherwise under the Act, the following transactions shall be valid, notwithstanding any prior act of bankruptcy, that is to say:—1, any disposition, or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise, made by any bankrupt in good faith and for valuable consideration; 2, any execution or attachment against his land, executed in good faith by seizure; and 3, any execution or attachment against his goods, executed in good faith by seizure and sale (*p*):—provided always, that the person on whose behalf such disposition was made, or such execution or attachment was issued, had no notice of an act of bank-

(*m*) Blackstone remarks (vol. ii. p. 486) that in France it was formerly carried to a still greater length, every act of a merchant for ten days precedent to the act of bankruptcy being presumed to be fraudulent, and therefore void. And he cites Sp. L. b. 29, c. 16,

(*n*) See 6 Geo. 4, c. 16, ss. 81—83; 2 & 3 Vict. cc. 11, 29.

(*o*) 32 & 33 Vict. c. 71, s. 94.

(*p*) See *Ex parte Veness*, In re Gwynn, Law Rep., 10 Eq. Ca. 419; *Ex parte Rocke*, In re Hall, ib., 6 Ch. App. 795.

ruptcy committed by the bankrupt, and available against him for adjudication (*q*).

There are cases, however, in which transactions are void as against the trustee, even independently of the doctrine of relation; for his title will prevail against all dispositions of property, under colour either of alienation or of legal execution, which were not *bonâ fide*, but of a merely feigned or collusive character,—whether a prior act of bankruptcy had been committed or not (*r*); and it will prevail also against all alienations and payments voluntarily (that is to say without pressure) made by the debtor, though he had committed no prior act of bankruptcy, if made in contemplation of bankruptcy, and with intention to give a preference to some particular creditor or creditors (*s*); for a transaction of this kind evidently tends to defeat the main principle of the bankrupt law (*t*); and an express provision is accordingly inserted in the Bankruptcy Act, 1869, to the following effect:—that every conveyance, transfer, or payment made by a person unable to pay his debts as they become due from his own monies, in favour of any creditor, with a view of giving him preference over the other creditors, shall, if the insolvent become bankrupt within three months afterwards, be deemed fraudulent and void as against the trustee; but this section is not to affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration (*u*). Moreover, when

(*q*) 32 & 33 Vict. c. 71, s. 95.

(*r*) See *Jackson v. Irving*, 2 Camp. 48.

(*s*) See *Morgan v. Brundett*, 5 B. & Adol. 289; *Atkinson v. Brindall*, 2 Bing. N. C. 225; *Strachan v. Barton*, 11 Exch. 647.

(*t*) See *Linton v. Bartlett*, 3 Wils. 17.

(*u*) 32 & 33 Vict. c. 71, s. 92. See *In re Craven*, *Ex parte Tem-*

pest, 40 L. J. (N. S.) Bank. 22; *Law Rep.*, 6 Ch. App. 70. Until this Act the law as to a fraudulent preference depended on no positive enactment, but on the general principles of the bankruptcy law. Under the above section it is still necessary to show that the payment was made *without pressure* (*In re Craven*, *ubi sup.*) A payment to a creditor who did not know that the debtor

the goods of a trader have been taken in execution for a judgment above 50*l.*, the trustee is to have the proceeds on giving the officer notice of the bankruptcy within fourteen days (*v*). Upon the same principle, too, it is enacted, that any settlement (including any conveyance or transfer) of property made by *a trader*—not being a settlement made before and in consideration of marriage, or in favour of a purchaser or incumbrancer, *bonâ fide* and for valuable consideration, or a family settlement of property accruing after marriage in right of the settlor's wife,—shall, if the settlor become bankrupt within two years after its date, be void as against his trustee; and shall be so void if he become bankrupt within ten years, unless the parties claiming thereunder can prove that at the time it was made the settlor was solvent without the aid of the property settled (*x*). And further, that any covenant or contract made by *a trader*, in consideration of marriage, for the future settlement on his wife or children of property wherein at the date of his marriage he had no estate or interest whatever, and not being property coming to him in right of his wife, shall, upon his becoming bankrupt before such property has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee (*y*).

Such being the leading rules with respect to what becomes vested in the trustee in right of the bankrupt, it is next to be observed that the bankruptcy being set on foot for the benefit of the creditors at large, it is to them (distributively) that the pecuniary produce in his hands is at length handed over; so that we are now to consider in what manner this result is secured—which leads us to the subject of *Audit* and *Dividend*.

was insolvent will not be avoided by this provision. (Ex parte Blackburn, In re Cheeseborough, Law Rep., 12 Eq. Ca. 358.)

(*v*) 32 & 33 Vict. c. 71, s. 87.

See Ex parte Key, In re Skinner, Law Rep., 10 Eq. Ca. 432.

(*x*) 32 & 33 Vict. c. 71, s. 91.

(*y*) Ibid.

The trustee is required to call a meeting of the *committee of inspection* once at least every three months, and to submit to them a statement of his accounts to be by them audited (*z*); and after such audit he is further required to forward such statement duly certified to an officer in London, called the comptroller in bankruptcy, on pain of being guilty of a contempt of court and punishable accordingly (*a*).

He is, moreover, required (under a similar penalty), as often as may be prescribed, and at the least once in every year during the bankruptcy, to transmit to the same officer a statement showing the proceedings of the bankruptcy in a prescribed form, up to the date of such statement; and it is the duty of the comptroller to examine the statements thus transmitted to him, and to call on the trustee to account for any misfeasance, neglect, or omission which he shall detect therein, and require the trustee to make good any loss to the bankrupt's estate thereby occasioned. And if the trustee shall fail to comply with such requisition, he may be reported to the court, and such order obtained against him as the court, after hearing his explanation (if any), shall think just (*b*).

Moreover, it forms part of the duty of the trustee, from time to time when the committee of inspection determines, to declare a dividend amongst the creditors (*c*); that is, to declare what payment shall be made out of the balance then at the bank to the credit of the trustee—he being required to pay in all sums from time to time received by him into such bank as the majority of creditors present at any general meeting shall appoint, and, failing such appointment, into

(*z*) 32 & 33 Vict. c. 71, ss. 20, 55; Gen. Rules, 1870, r. 246; Rules 1871, rr. 14—16.

(*a*) 32 & 33 Vict. c. 71, s. 55.

(*b*) Sects. 56, 57; Gen. Rules, 1870, rr. 250, 251; Rules 1871, r. 9. Independently of these statements the comptroller has power to call

on the trustee to answer inquiries and may cause him to be examined on oath (sect. 58.)

(*c*) Sect. 41. In the event of the trustee not declaring a dividend for the space of *six months*, he must summon a meeting of the creditors and explain the reason. (*Ibid.*)

the Bank of England(*d*). This payment is made at so much in the pound, to all creditors who have previously proved, or shall then prove, their debts; after making allowance for creditors who are too distant to have had time to establish their proofs, or who may have made claims not yet determined by the court(*e*).

The payment made by the dividend is made equally, and in a rateable proportion to all the creditors, according to the *quantity* of their debts, no regard being in general had to the *quality* of them. Hence judgments and recognizances, and other debts by record or specialty, are all put on a level with debts by mere simple contract, and are all paid *pari passu* (*f*). And equitable are placed on the same footing in this respect as legal debts.

On the other hand, however, the principle of equality is in some particular cases either wholly or partially departed from. Thus, a creditor, who has a specific security on the property of the bankrupt (such as a mortgage or chattel held in pledge) is entitled, notwithstanding the bankruptcy, either to give up his security and prove for his whole debt; or else to realize, or give credit for the value of, such security, and to prove and receive a dividend *pari passu* with the other creditors in respect of any surplus remaining unpaid(*g*). So a landlord, who, after the commencement of the bankruptcy, distrains for rent on the bankrupt's goods, is entitled to make such distress available for his separate payment to the extent of one year's rent prior to the order of adjudication(*h*);

(*d*) 32 & 33 Vict. c. 71, s. 30. If at any time the trustee keeps in his hands for more than ten days any sum exceeding 50*l.*, he must pay interest on the same at the rate of 20*l.* per cent.; and is liable moreover (unless he can satisfy the court as to the retention) to be dismissed from his office without remuneration (*ib.*)

(*e*) Sects. 41—43.

(*f*) See *Orlebar v. Fletcher*, 1 P. Wms. 738.

(*g*) 32 & 33 Vict. c. 71, s. 40. Gen. Rules, 1870, rr. 99—101.

(*h*) 32 & 33 Vict. c. 71, s. 34. See *Ex parte Birmingham and Staffordshire Gas Light Co.*, Re Fanshaw, Law Rep., 11 Eq. Ca. 615.

though for the remainder he must come in *pari passu* with the rest of the creditors (*i*). And to this we may add, that a priority is given to parochial and other local rates, and to any assessed, land, property, or income tax due from the bankrupt, to the extent of one year's assessment; and also to what is due as wages or salaries to any of his clerks or servants to the extent of four months and not exceeding 50*l.*, or to any of his labourers or workmen, not exceeding two months' wages (*k*). Such debts as these are to be paid in full if the property of the bankrupt is sufficient, and in priority to all other debts (*l*).

With regard to the distribution of the bankrupt's assets, it may be observed, in addition to what has already been said, that demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise are *not* proveable in bankruptcy; and that no person having notice of any act of bankruptcy available for adjudication against the bankrupt, can prove for any debt or liability contracted by the bankrupt subsequently to the date of such notice having been received (*m*). But, save as afore-said, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to such order, may be proved (*n*); and where the debt or liability does not bear a certain value, by reason of its being subject to any contingency, or for any other reason, the same shall be

(*i*) 32 & 33 Vict. c. 71, s. 34. See *Briggs v. Sowry*, 8 Mee. & W. 729; *Newton v. Scott*, 10 Mee. & W. 471; *Paull v. Best*, 3 B. & S. 537. By the Friendly Societies Act, 18 & 19 Vict. c. 63, the debts due to the societies from any of their officers becoming bankrupt are directed to be paid in priority of

other debts. No notice of this provision is taken in the Bankruptcy Act of 1869, and it seems doubtful if it is still to be considered in force.

(*k*) 32 & 33 Vict. c. 71, s. 32.

(*l*) *Ibid.*

(*m*) Sect. 31.

(*n*) *Ibid.*

estimated by the trustee, and, in case of dispute, according to the order of the court, either with or without the intervention of a jury, and the proof shall be for the sum thus assessed(*o*). And it may further be observed, that the term “liability” is to include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money’s worth on the breach of any covenant or agreement, whether likely or not to occur before the close of the bankruptcy, and generally any engagement or undertaking to pay money or money’s worth, whether fixed or unliquidated, present, future or contingent, and whether capable of being ascertained by fixed rules or by a jury only, or as matter of opinion (*p*).

Where all the bankrupt’s estate is not exhausted by the first dividend (as where some of the property has not been got in or remains unsold, no purchaser having yet been found), the like proceedings for the declaration and payment of a dividend, as have been already mentioned, are to be had from time to time, until the whole are divided among the creditors, and a final dividend declared (*q*); and if any *surplus* remains after paying every creditor his full debt, together with the costs, charges and expenses of the bankruptcy, it shall be restored to the bankrupt.

Having now given such an account of the existing system under which the law of bankruptcy is administered as is consistent with the limits of this work, we will conclude the chapter by some explanation of an alternative method of proceeding, which, under the name of *liquidation* (either by way of arrangement or composition), has become of very extensive use, being found in many respects more convenient than a bankruptcy. And we may premise that, although the machinery adopted for liquidation by

(*o*) 32 & 33 Vict. c. 71, s. 31.

(*p*) Ibid.

(*q*) Sect. 44. *Interest* on the debts may be paid by the trustee in

cases where it would have been allowable by a jury, had an action been brought (sect. 36). Vide sup. p. 98.

arrangement differs in some of its details from that which has been devised for a bankruptcy, the principles of the law of bankruptcy, as the general rule, attach to it—it being in particular enacted, that the trustee under a liquidation by arrangement shall have the same powers and perform the same duties as a trustee under a bankruptcy, and that the property of the debtor shall be distributed in the same manner as in a bankruptcy; and that, with certain modifications, the provisions of the Act of 1869, in reference to bankruptcy, shall also apply to the case of a liquidation by arrangement (*r*).

Under the system which was in force prior to the Act of 1869, it was competent (as we have seen) for a debtor himself to present a petition that he should be adjudicated a bankrupt (*s*); but as this was in too many cases done as a means of freeing himself from the obligation of his debts previously contracted, without giving up any property to be distributed amongst his creditors—it was not thought expedient to renew this power in the 32 & 33 Vict. c. 71. On the other hand, it was considered within the true spirit of our bankrupt laws to provide the easiest manner of carrying into effect any amicable arrangements between a debtor and his creditors: and that such arrangements should be freed, as far as was consistent with the prevention of fraud, from any external interference.

Two methods of proceeding have consequently been authorized by the legislature to carry out these ideas, viz., *liquidation by arrangement* and *liquidation by way of composition*; and of these in their order.

The first proceeding for liquidation (whether in one way or the other) is for the debtor to file a petition (*t*), alleging that he is unable to pay his debts, and is desirous of instituting proceedings for liquidation of his affairs by arrange-

(*r*) 32 & 33 Vict. c. 71, s. 125, subss. 7.

(*s*) Vide sup. p. 147.

(*t*) As to the proper court in which to file the petition, according

to whether the debtor resides within or without the metropolitan bankruptcy district, vide sup. p. 154, n. (*g*).

ment or composition with his creditors; and praying that the proper general meetings of them may be convened; and that such resolutions as may be passed by his creditors as require registration may be duly registered by the registrar of the court (*t*).

At the general meeting summoned by the court in compliance with this prayer, the creditors may accordingly adopt one of two courses. They may, in the first place, after electing a chairman of the meeting, proceed by "special" resolution—i. e., by one passed by a majority in number and three-fourths in value of the creditors present, personally or by proxy—to declare that the affairs of the petitioning debtor are to be liquidated in *arrangement*, and not in bankruptcy; and may then appoint a trustee, either with or without a committee of inspection (*u*).

In the trustee thus appointed, all such property of the debtor vests as would have vested in his trustee had he been made a bankrupt; and the distribution of his estate proceeds on the same principles as those already explained in reference to a bankruptcy. But the discharge of the bankrupt is granted not by the court, but by a special resolution of the creditors; who may also fix their own time for the close of the liquidation, the release of the trustee, and the mode and time for the audit of the accounts (*v*).

But, instead of adopting this course, it is also competent for the general meeting convened by the court in compliance with the debtor's petition for liquidation, to pass by a majority in number and three-fourths in value of his creditors, a resolution (confirmed at a subsequent meeting), that, without any proceedings in bank-

(*t*) 32 & 33 Vict. c. 71, s. 125, Form, No. 106; General Rules, 252, 253. The filing of this petition is an *act of bankruptcy*. (Ex parte Duignan, In re Bissell, Law Rep., 6 Ch. App. 605.)

(*u*) 32 & 33 Vict. c. 71, ss. 16,

125, 126; Gen. Ord. 275, 302. See *Bramble v. Moss*, Law Rep., 3 C. P. 458; *Ex parte Pooley*, In re Russell, 5 Ch. App. 722.

(*v*) 32 & 33 Vict. c. 71, s. 125, subs. 9.

ruptcy, a *composition* be accepted in satisfaction of the debts due to them from the debtor (*x*). And this resolution is presented to the registrar, whose duty it shall be to register the same on being satisfied that it has been passed as directed by the Act (*y*). Until such registration, the resolution is of no validity, but when registered it becomes binding on all the creditors whose names and addresses and the amount of debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution was passed, though it does not affect or prejudice the rights of any other creditors (*z*).

(*x*) 32 & 33 Vict. c. 71, s. 126. As to the difference in the position of a secured creditor in the case of a "composition" as distinct from a "liquidation," see Birmingham Gas Light and Coke Company, *In re* Adams, Law Rep., 11 Eq. Ca. 204.

(*y*) 32 & 33 Vict. c. 71, s. 126. See *Ex parte* Levy & Co., *In re* Varbetian & Co., Law Rep., 11 Eq. Ca. 619.

(*z*) The court of bankruptcy has jurisdiction to decide all questions necessary to distribute the debtor's property under a registered deed of

composition. (*Ex parte* Rumboll, *In re* Taylor and Rumboll, Law Rep., 6 Ch. App. 842.) If the debtor make default in the provisions of a composition into which he has entered, he may be sued by a creditor for the balance of the whole debt (*In re* Hatton, Law Rep., 7 Ch. App. 723), and on continuing to make default after having been ordered by the court to pay in accordance with a composition, he will be *in contempt*. (32 & 33 Vict. c. 71, s. 126.)

CHAPTER VII.

OF TITLE BY WILL AND BY ADMINISTRATION.



THERE yet remain to be examined two other methods of acquiring personal estates, viz., by *will* and by *administration*. And these we shall consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them separately, without manifest tautology and repetition.

Under the law of devises our attention has already been turned to the subject of wills or testaments, in reference to *land*: and we were led on that occasion to explore the nature and origin of testamentary disposition in general; and to notice a variety of matters respecting wills which it may be material to recall thus generally to the reader's recollection, but which it would be improper to reiterate (*a*). Our present object is to treat exclusively of a will considered as an instrument conferring a title to *personal estate*—inclusive of chattels real (*b*)—and to the analogous subject of the title by administration, to the personalty of such as die intestate. Both of which subjects until recently belonged (by an anomaly that was peculiar to our law) to the jurisdiction of the Ecclesiastical Courts, but have been now transferred, (as we shall presently find,) to a new secular court established by Act of parliament (*c*).

(*a*) Vide sup. vol. I. pp. 588—614.

(*b*) As to chattels real, vide sup. vol. I. p. 280.

(*c*) The Ecclesiastical Courts had no jurisdiction at any time, in re-

spect of wills, so far as they operate as a conveyance of land, but only in regard to their operation upon personal estate. It is otherwise with the new Probate Court. Vide post, p. 190, n. (*u*).

In the pursuit then of these topics, it is proposed, First, To trace the progress or history of the title to personal estate, by will and by administration. Secondly, To show the manner of making a will and its requisites, when considered as a disposition of personal estate. Thirdly, To show the manner of granting administration. And, lastly, to select some few of the general heads, of the office and duty of executors and administrators.

I. [Though wills, operating on personalty, have been, as formerly remarked, of immemorial use in England(*e*), we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us that by the common law, as it stood in the reign of Henry the second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *è converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other: but if he died without either wife or issue, the whole was at his own disposal(*f*). The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them(*g*).

This continued to be the law of the land at the time of Magna Charta(*h*); which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased: and if nothing be owing to the Crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis* (*i*). In the reign

(*e*) Vide sup. vol. I. p. 591.

(*g*) F. N. B. 122.

(*f*) L. 7, c. 5. And see Bracton,
1. ii. c. 26; Flet. 1. ii. c. 57.

(*h*) See 9 Hen. 3, c. 18.

(*i*) 9 Hen. 3, c. 18.

[of King Edward the third, this right of the wife and children was still held to be the universal or common law (*j*); though frequently pleaded as the local custom of Berks, Devon and other counties (*k*); and, in the reign of Charles the first, Sir Henry Finch lays it down, expressly, to be the general law of the land (*l*). But this law is at present altered by imperceptible degrees; and the deceased may now, by will, bequeath the whole of his goods and chattels, though we cannot trace out when first this alteration began. Indeed Sir Edward Coke is of opinion, that the right of the wife and children never was the general law, and only obtained in particular places by special custom; but to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion (*m*). For Bracton lays down the doctrine of the “reasonable part” to be the common law; and mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule (*n*). And Glanvil, Magna Charta, Fleta, the Year Books, Fitzherbert, and Finch, do all agree with Bracton that this right to the *pars rationabilis* was by the common law: as it also continues to this day to be the general law of Scotland (*o*). To which we may add, that, whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the antient method continued in use in the province of York, the principality of Wales, and in the city of London, until modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes were provided: the one

(*j*) M. 30 Edw. 3, 25; H. 17 Edw. 3, 9.

(*k*) Reg. Brev. 142; Co. Litt. 176.

(*l*) Finch, Law, 175.

(*m*) 2 Inst. 33.

(*n*) L. 2, c. 26, s. 2.

(*o*) Dalrymple on Feudal Property, 145. In Scotland the widow's share is called *jus relictæ*, and that which falls to the children the *legitim*. Ersk. Instit. b. iii. tr. 9, s. 15.

[4 & 5 W. & M. c. 2, (explained by 2 & 3 Ann. c. 5,) for the province of York; another, 7 & 8 Will. III. c. 38, for Wales: and a third, 11 Geo. I. c. 18, for London; whereby it was enacted, that persons within those districts, and liable to those customs, might (if they thought proper) dispose of *all* their personal estates by will; and the claims of the widow, children and other relations to the contrary were totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England; and a man may devise the whole of his chattels, as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places to remember his lord and the Church, by leaving them his two best chattels; which was the original of heriots, of which we have already treated (*p*), and of mortuaries, to which we shall advert hereafter (*q*); and afterwards he was left at his own liberty to bequeath the remainder as he pleased.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die *intestate*; and in such cases, it is said, that by the old law the king was entitled to seize upon his goods as the *parens patriæ*, and general trustee of the kingdom (*r*). This prerogative the king continued to exercise for some time by his own ministers of justice, and probably in the county court of the sheriff, where matters of all kinds used to be determined. And it was granted as a franchise to many lords of manors and others, who long enjoyed a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron and other courts; or to have their wills there proved, in case they made any disposition (*s*). Afterwards the Crown, in favour of the Church, invested the prelates with this branch of the prerogative;

(*p*) Vide sup. vol. I. p. 628.

(*r*) 9 Rep. 38.

(*q*) Vide post, bk. IV. pt. II. c. II.

(*s*) Hensloe's case, 9 Rep. 37 b.

[which was done, saith Perkins, because it was intended by the law, that spiritual men are of better conscience than lay men, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased (*t*). The goods, therefore, of intestates were given by the Crown to the ordinary (*u*): that is, to the ordinary ecclesiastical judge of the place; who was (generally speaking) the bishop of the diocese. And he might seize them, and keep them without wasting, and might also give, alien, or sell them at his will, and dispose of the money *in pios usus*; and, if he did otherwise, he broke the confidence which the law reposed in him (*x*). So that, properly, the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese,—in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious (*y*). And, as he had thus the administration of the effects of intestates, a jurisdiction in the matter of wills, also, of course followed; for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate whose right of distributing his chattels for the good of his soul was effectually superseded thereby (*z*).

(*t*) S. 486.

(*u*) The ordinary (*ordinarius*) is a name taken from the Canonists, and applied to a bishop or other person with "ordinary" jurisdiction in matters ecclesiastical. He is so called "*quia habet ordinariam jurisdictionem, in jure proprio, et non per deputationem*." (Co. Litt. 96 a.) It is to be observed, that though the ordinary was properly the judge to whose jurisdiction the administration upon intestacy and the probate of wills belonged,—yet the ecclesiastical court in such matters was in fact held before the

chancellor of the diocese (or commissary) sitting for the bishop in his consistory court.

(*x*) Finch, Law, 173, 174.

(*y*) Plowd. 277.

(*z*) Blackstone (vol. iii. p. 96) observes, that the precise period when the church acquired jurisdiction over intestacies and testaments, is not ascertained; and that Lindewode (fol. 263) confesses "*ejus regis temporibus hoc ordinatum sit, non reperio*." The commentator proceeds to add, that the jurisdiction was, however, of undoubted antiquity; Stratford, temp. Edw. 3, mentioning

[To revert, however, to administrations; the goods of the intestate being thus vested in the ordinary, upon the most solemn and conscientious trust, the reverend prelates were, therefore, not accountable to any, but to God and themselves, for their conduct (*a*). But even in Fleta's time it was complained, "*quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes, nullam vel saltem indebitam faciunt distributionem*" (*b*). And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent the fourth, written about the year 1250: wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum descendentium ab intestato in opus ecclesiæ et pauperum dispensanda est*" (*c*). Thus, the popish clergy took to themselves (under the name of the Church and poor) the whole residue of the deceased's estate after the *partes rationabiles*, or two-thirds, of the wife and children were deducted, without paying even his lawful debts, or other charges thereon (*d*). For which reason, it was enacted by the statute of Westminster the second (*e*), that the ordinary should be bound to pay the debts of the intestate, so far as his goods will extend, in the same manner that executors were bound, in case the deceased had left a will: a use more truly pious than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power which the law had intrusted to ordinaries. But though they were now made liable to the creditors of the intestate

it as "*ab olim ordinatum*," and Cardinal Othobon, (52 Hen. 3,) speaking of it as an antient tradition. (And see Bracton, Lib. 5, c. 10.) Moreover, we find that the disposition of intestates' goods, "*per visum ecclesiæ*," was one of the articles confirmed by Magna Charta.

(*a*) Plowd. 277.

(*b*) L. ii. c. 57, s. 10.

(*c*) In Decretal. l. v. t. 3, c. 42.

(*d*) The proportion given to the priest and to other pious uses, was different in different places. In the archdeaconry of Richmond in Yorkshire, this proportion was settled by a papal bull, A.D. 1254 (Regist. Honoris de Richm. 101), and was observed till abolished by the statute 26 Hen. 8, c. 15.

(*e*) 13 Edw. 1, c. 19; see Snelling's case, 5 Rep. 83 a.

[for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their own immediate dependents: and therefore the statute 31 Edw. III. c. 11, provided, that, in case of intestacy, the ordinary should depute the nearest and most lawful friends of the deceased to administer his goods; which administrators were put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This was the original of *administrators*, as they were afterwards called, who were only the officers of the ordinary, appointed by him in pursuance of this statute, which singled out the *next and most lawful* friend of the intestate; who was interpreted to be the *next of blood* that was under no legal disabilities (*f*). The statute 21 Henry VIII. c. 5, however, enlarged a little more the power of the ecclesiastical judge; and permitted him to grant administration *either* to the widow, *or* the next of kin, or to both of them, at his own discretion; and, where two or more persons are in the same degree of kindred, gave the ordinary his election to accept whichever he pleased.]

Upon this footing stood the law of wills and administrations, from at least as early as the commencement of the twelfth century, up to the year 1857; the ecclesiastical jurisdiction as to these, having been a peculiar constitution of this island; inasmuch as in almost all other, even popish, countries, they were under the jurisdiction of the civil magistrates (*g*). But in our own times, this constitution came to be viewed with great disfavour; the opinion having gradually obtained that the subjects in question were not handled by the ecclesiastical courts as effectively,

(*f*) 9 Rep. 39.(*g*) See 3 Bl. Com. 95, 97.

expeditiously, and cheaply as the interests of justice required; and this opinion at length led to the introduction, by act of parliament, of a new system, whereby the jurisdiction which these courts during eight centuries enjoyed over wills and intestacies, has been now transferred to a court of an entirely new construction. For by 20 & 21 Vict. c. 77—amended by 21 & 22 Vict. c. 95 (*h*)—this jurisdiction was directed to be thenceforth exercised in the “Court of Probate” (*i*)—to be held at such place in London or Middlesex as her Majesty in council might appoint (*k*). But in general, and except as otherwise provided by these Acts, and by the rules and orders issued under their authority (*l*), it is to be understood that the same powers and duties, and the same practice, are to belong to the new court, as had previously belonged to the principal court for wills and administrations; viz., the Prerogative Court of the Archbishop of Canterbury (*m*).

II. We shall now address ourselves to our second head

(*h*) See also 21 & 22 Vict. c. 56, c. 12, and 22 Vict. c. 30, as to the case of persons dying domiciled in Scotland, but having personal estate in England.

(*i*) This court was created by the Act (20 & 21 Vict. c. 77), but the term “probate” had been antecedently in use. As to its meaning, vide post, p. 191.

(*k*) 20 & 21 Vict. c. 77, ss. 4, 5. Under the Judicature Act, 1873, which commences 2nd November, 1874, this Court of Probate is absorbed into the Supreme Court of Judicature; and its jurisdiction transferred and assigned to the “Probate, Divorce and Admiralty” division of the High Court of Justice by that Act established. (36

& 37 Vict. c. 66, ss. 3, 34.)

(*l*) See rules and orders for the Court of Probate, dated 30th July, 1862, 27th January, 1863, and 29th December, 1865. As to its practice, see Coote’s Probate Practice, which is recognized as “the text book of the court” (see per Sir J. P. Wilde, *Re Newbold*, Law Rep., 1 P. & D. 286).

(*m*) 20 & 21 Vict. c. 77, ss. 23, 29. It may be here remarked, that in the Prerogative Court neither serjeants nor barristers were allowed to practise, but doctors of law only. In the new Probate Court, this is otherwise (see 21 & 22 Vict. c. 95, s. 2). See also as to the right of *attornies* to practise in the Court of Probate, 20 & 21 Vict. c. 77, s. 45.

of inquiry, namely, the manner and requisites of wills, considered as dispositions of personal estate. Under this head we propose to consider,

1. The *capacity* of persons to be testators: as to which the rule is, that all persons are capable, unless made otherwise by the special exception of the law (*o*); and the law in this particular being the same as before laid down in regard to the alienation of personalty generally, these exceptions apply to all persons who labour under unsoundness of mind (*p*), or are restrained of their freedom of will by duress (*q*). Married women are also (except in certain cases) incompetent by reason of their coverture; in which our constitution differs materially from the civil law (*r*). For, among the Romans, there was no distinction. A married woman was as capable of bequeathing as a *feme sole* (*s*). But with us it is otherwise; inasmuch as all her personal chattels belong in general to her husband, who may also dispose of her chattels real, or shall have them to himself if he survives her. It would be, therefore, extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing those chattels to another (*t*). Yet by her husband's licence she may dispose of her personalty by will (*u*); or more properly by his *assent*; for unless he sanctions the particular will in question, his previous licence to make one will not avail (*x*). And such assent amounts to no more than a waiver of his general right of administering his wife's effects; so that it will not be effectual unless he happens to survive her, for in that case only could he have

(*o*) 2 Bl. Com. 496.

(*p*) As to the case of *partial* unsoundness of mind, see *Smith v. Tebbitt*, Law Rep., 1 P. & D. 398, *contra* *Banks v. Goodfellow*, Law Rep., 5 Q. B. 549.

(*q*) Vide sup. vol. I. pp. 474, 475.

(*r*) 2 Bl. Com. 497.

(*s*) Fl. 31, l. 77.

(*t*) 4 Rep. 51.

(*u*) Dr. & St. d. 1, c. 7.

(*x*) See Bro. Abr. *Devise*, 34; Str. 891; *Henley v. Phillips*, 2 Atk. 49; *Barnsby v. Haines*, Lee's Rep. 120; *Tucker v. Inman*, 4 Man. & G. 1076.

been her administrator(*y*). The rule as to the incapacity of married women to make wills is subject, moreover, to some other exceptions. For, first, the queen consort may dispose of her chattels by will, even without the consent of the king(*z*). And any married woman may make her will of goods which are in her possession in *autre droit*, as executrix or administratrix(*a*). So she may bequeath any property by will, where an express *power* has been conferred upon her so to dispose of it; though her will may in that case be more properly described as an appointment in execution of the power(*b*). She may also thus dispose of any property which she holds *to her separate use* under the provisions of the Married Women's Property Act, 1870(*c*), or under the trusts of a settlement(*d*). Another incapacity to be a testator is that which arises through immaturity of age: as to which the rule until a recent period was, that a male was competent to make a will at the age of fourteen; a female at twelve; but neither of them at an earlier period(*e*); and this was also the regulation of the civil law(*f*). But it is now expressly provided by the New Will Act, passed in the year 1837, that no will thereafter made by a person under the age of twenty-one years shall be valid(*g*).

2. We shall next advert to the *solemnities* which the

(*y*) *Stevens v. Bagwell*, 15 Ves. 153; and see *Re Rebecca Smith*, 1 Swab. & Trist. 125.

(*z*) *Co. Litt.* 133.

(*a*) *Godolph.* 1, 10.

(*b*) *Southby v. Stonehouse*, 2 Ves. 610; *Shelford on Wills*, 130. See also *Wms. on Executors*, 45, 3rd edit.; *Sugd. on Powers*, 287, 6th edit.; *sup. vol. I.* p. 594. As to powers in general, *vide sup. vol. I.* p. 547.

(*c*) See 33 & 34 Vict. c. 93, ss. 1, 7.

(*d*) *Peacock v. Monk*, 2 Ves. sen.

191; *Taylor v. Meads*, 24 L. J., Ch. 203.

(*e*) 2 Bl. Com. 497, cites *Godolph.* p. 1, c. 8; *Went.* 212; 2 Vern. 104, 469; *Gilb. Rep.* 74. See *Co. Litt.* by Harg. 89, n. (6); *Wats. Conv.* 404 (8th edit.), in notis.

(*f*) Bl. Com. ubi *sup.*; *Co. Litt.* by Harg. 98 b, n. (6).

(*g*) 7 Will. 4 & 1 Vict. c. 26, s. 7. But wills of personalty made by soldiers and seamen in actual service, are excepted from this enactment. *Vide sup. vol. I.* p. 598.

execution of the will requires. And here also the law has lately undergone important alterations. It was formerly as follows:—a testament (as regarded personal property) might be either *written* or *verbal*, (otherwise called *nuncupative*); of which the former was *published* or declared by the testator as his written will; the latter depended merely upon oral evidence; being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. But as nuncupative wills and codicils—which became less used as the art of writing became more general—were liable to great impositions, and occasioned many perjuries, the Statute of Frauds (29 Car. II. c. 3) laid them under many restrictions, except when made by mariners at sea, and soldiers in active service (*h*); and indeed surrounded them by so numerous a train of requisites, that the things themselves fell into disuse long before they were expressly abolished (*i*). At the period of the law of which we are speaking, the proof required of a *written* will of personalty was scarcely more satisfactory. As the general rule no witnesses were required for its authentication (*k*): and if written in the testator's own hand (though it had neither his signature nor seal, nor any witness present at its publication), it was good, provided sufficient proof could be had that it was in fact his handwriting (*l*). Nay, it was good though written in another man's hand, and never signed by the testator, if shown to be according to his instructions, and to have been by him approved (*m*). Such were the rules on the subject of solemnities, so far as the will was to operate as a disposition of the personal estate; while on the other hand as regarded the real estate, (as we mentioned in a former volume,) it was

(*h*) As to codicils, vide sup. vol. I. 173.

p. 598.

(*i*) 2 Bl. Com. 501.

(*k*) Ibid.; and see Phil. Ec. C.

(*l*) 2 Bl. Com. 501, cites Godolph.

p. 1, c. 21; Gilb. Rep. 260.

(*m*) Comyns, 452, 453, 454.

required not only to be invariably in writing, but to be attested by three witnesses. But the 7 Will. IV. & 1 Vict. c. 26, introduced the obvious improvement of establishing one uniform rule on this subject; which the reader will remember requires that every will (whether of real or personal estate) shall be a written instrument, signed by the testator or some other person in his presence and by his direction, and attested by two or more witnesses present at the same time and in the presence of each other; while, on the other hand, the Act dispenses with any further publication (*n*). In reference to the operation of a will on *personal* estate, it has moreover been further enacted by 24 & 25 Vict. c. 114, that, as regards such estate, every will and other testamentary instrument made within the United Kingdom, by any British subject who shall die after 6th August, 1861, shall be admitted to probate—whatever may be his *domicile* at the time of making the same, or at the time of death—provided it be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. And, further, that every will made *out* of the United Kingdom by a British subject who shall die after that date, shall (as regards personal estate) be admitted to probate—whatever may be his domicile at the time of making the same or at the time of death—if made according to the forms required either by the law of the place where it was made, or of the place where the testator was domiciled when it was made, or by the laws at that time in force in that part of her Majesty's dominions where he had his domicile of origin (*o*).

(*n*) Vide sup. vol. I. p. 596.

(*o*) It may here be remarked, that the domicile of the deceased governs the succession to his personalty. (See *Doglioni v. Crispin*, Law Rep., 1 Ap. Ca. 301.) By 24 & 25 Vict. c. 114, s. 3, it is also declared that no will of any person who shall die

after 6th August, 1861, shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of *domicile* of the testator. And see 24 & 25 Vict. c. 121, which, after reciting that “by reason of the present law of

3. The next point that we shall notice, is the *appointment of an executor*. In every will by which personal estate is bequeathed, such an appointment ought regularly to be made (*p*); but it is capable of being made either by express words or by a clear implication (*q*). An executor is he to whom another man commits by will the execution of his last will and testament. And all persons are capable of being executors that are capable of making wills, and many others besides; as *femes covert* (*r*), and infants (*s*): nay, even an infant unborn, *en ventre sa mère*, may be made executor (*t*).

4. We shall lastly advert to the *probate*; being the authentication of the will in a particular manner, which the law deems essential to the completion of any title to be made under a will to personal estate, including chattels real (*u*). Until recently (that is, prior to the Act of

“domicile the wills of British subjects dying while resident abroad
“are often defeated, and their personal property administered in a
“manner contrary to their expectation and belief,” proceeds to enable Her Majesty to direct, by order in council, that no British subject resident at the time of his death in any foreign country named in such order (and with which country she has by convention agreed that similar provisions shall be made with regard to the subjects thereof resident in the United Kingdom), shall be deemed to have acquired a domicile in such foreign country, unless residing there for a year preceding death, and having made such declaration of desire to become domiciled as in the Act mentioned.

(*p*) Went. Off. Ex. c. 1; Plowd. 281.

(*q*) 2 Bl. Com. 503.

(*r*) But probate will not be granted to a *feme covert* if her hus-

band refuses to allow her to act as executrix. (See *Pemberton v. Chapman*, 1 Ell., Bl. & Ell. 1056.)

(*s*) Vide sup. p. 187.

(*t*) West. Symb. p. 1, s. 635.

(*u*) Bl. Com. ubi sup. See *Smith v. Miller*, 1 T. R. 480; *Doe v. Mew*, 7 A. & E. 240; *Doe v. Gunning*, ibid. 243; *Matson v. Swift*, 8 Beav. 368. The case is otherwise in making title to *real* estate, where the will may be authenticated by proving it before a jury according to the ordinary course with other instruments. On the other hand, a devise of real estate may now also be authenticated by probate; though until recently it could not. For by the 20 & 21 Vict. c. 77, s. 62, it is provided that, after proof in solemn form (the meaning of which expression will presently appear), the probate is to be received as “conclusive evidence of the validity
“and contents of the will in proceedings affecting real estate, in

20 & 21 Vict. c. 77) proof of the will was given by the executor—if he accepted the office, for that is of course in his discretion (*x*)—before the *ordinary*, *i. e.*, as the general rule, the bishop of the diocese (*y*): and such proof was either in *common form*, which was upon the executor's own oath, before such ordinary or his surrogate,—or *per testes*, in more solemn form of law, in case the validity of the will was disputed (*z*). And when the will was so proved, the original was deposited in the registry of the ordinary (*a*); and a copy thereof on parchment made out under his seal, and delivered to the executor, together with a certificate of its having been duly proved before him. All which together is usually styled the *probate*, though that term is also often applied to the official copy of the will taken alone (*b*). As to this proceeding, however, it is to be remarked, that probate before the ordinary, as just mentioned, was in general the proper course, in case all the goods of the deceased lay, at the time of his death, within the same diocese or other ecclesiastical jurisdiction. But

“like manner as a probate is received in evidence in matters relating to the personal estate.” See also sects. 63—65, and the case of *Barracrough v. Greenhough*, Law Rep., 2 Q. B. 612.

(*x*) When the executor formally refuses to accept the office he is said to *renounce* probate; as to which, see *Creswick v. Woodward*, 4 Man. & G. 814; *Venables v. East India Company*, 2 Exch. 633; and 20 & 21 Vict. c. 77, s. 79; 21 & 22 Vict. c. 95, s. 16.

(*y*) As to the ordinary, vide sup. p. 182, n. (*u*).

(*z*) See Godolph. vol. 1, c. 20, s. 4, where the mode of “proving in form of law” is more particularly explained. When no opposition was made in the ecclesiastical court,

the probate or administration was granted *ex officio et debito justitiæ*. But when a *caveat* was entered, a *suit* in that court followed, to determine the validity of the instrument, or who had a right to administer. (See 3 Bl. Com. 98.)

(*a*) The original will is now to be deposited under the control of the Court of Probate, in a place to be directed by Order in Council. (20 & 21 Vict. c. 77, s. 66.)

(*b*) As to the *ad valorem* stamp duty payable on probate, see 5 & 6 Vict. c. 79, s. 23; 22 & 23 Vict. c. 36; 23 Vict. c. 15, ss. 4, 5; 24 & 25 Vict. c. 92, s. 3. No stamp duty is payable where the effects do not exceed 100*l*. (27 & 28 Vict. c. 56, s. 5.)

if the deceased had *bona notabilia* (*i. e.*, chattels to the value of a *hundred shillings*) in two distinct dioceses or jurisdictions, then the will was to be proved before the metropolitan of the province, by way of special prerogative (*d*). And hence, the courts where the validity of such will was tried, and the offices where they were registered, were called the *prerogative courts*, and the *prerogative offices*, of the provinces of Canterbury and York respectively (*e*). But the law as to *bona notabilia* is now entirely done away; the effect of 20 & 21 Vict. c. 77, being that the whole jurisdiction and authority in relation to granting probates, and the depositing and preserving wills, is now exercised by the new Court of Probate, without reference to the locality in which the property of the deceased may lie (*f*). A distinction, however, still obtains between proving in *common form*, and proving in a case of *contention*,—substantially the same with the former distinction between proving in common form, and proving *per testes*, or in solemn form (*g*). For in connection with the court, and under its control, there are subordinate jurisdictions called “District Registries,” held within various country districts set forth in a schedule to the Act; over each of which jurisdiction presides a “District Regis-

(*d*) 4 Inst. 335; see Attorney-General *v.* Bouwens, 1 Horn. & Hurl. 319. As to *bona notabilia*, see 2 Bl. Com., p. 509; Gurney *v.* Rawlins, 2 Mee. & W. 87; Easton *v.* Carter, 5 Exch. 8; and 10 & 11 Vict. c. 98, s. 6.

(*e*) The reason assigned by Blackstone for this prerogative is the inconvenience that would otherwise have resulted from the necessity of taking out probates or administrations in all the different dioceses in which the deceased had property to the amount of 5*l.* *Bona notabilia*

were fixed at that amount by the canons of 1603 (see 2 Bl. Com. p. 509).

(*f*) 20 & 21 Vict. c. 77, s. 4. As to the deposit of wills after probate, see *ibid.* sects. 52, 66, 89, 90. As to the deposit of wills of living persons, for safe custody, sect. 71.

(*g*) Vide *sup.* p. 191. As to the practice of proving in solemn form under the new Act, see Moore *v.* Holgate, Law Rep., 1 P. & D. 101; Peacock *v.* Lowe, *ibid.* 311.

trar.” And the Act provides, that (at the option of the parties interested) a will may be proved or administration granted either in London or in the registry of the district in which the deceased had, at the time of death, a fixed place of abode;—provided the business be in “*common form*,” and involves no contention as to the right of proof or grant; for if it does, then recourse must always be had to the principal court (*h*).

III. Our third head of inquiry is, the manner of granting *administration*. Until the change in the law to which we have already adverted, if the deceased died intestate, then letters of administration were granted by the ordinary or else by the metropolitan,—according to the distinctions with respect to *bona notabilia* already stated (*i*). But the grant is now made by the Court of Probate, under the provision for that purpose contained in 20 & 21 Vict. c. 77, s. 4 (*k*). As to the person to whom the office is to be thus granted, the new court follows, except under special circumstances, the rules which used to be obligatory on the ordinary, and which are as follows:—

1. Administration of the goods and chattels of the wife must be granted to the husband or his representatives (*l*): and of the husband’s effects, to the widow, or next of kin; but the court may grant it to either, or both, at its discretion (*m*). 2. Among the kindred, those are to be pre-

(*h*) 20 & 21 Vict. c. 77, ss. 2, 46—48. However, in contentions cases, where the estate is under 200*l.*, resort may be had to the County Court for the district, in place of the Court of Probate. (21 & 22 Vict. c. 95, s. 10.)

(*i*) Vide sup. p. 192.

(*k*) An Act has been recently passed to enable administration to be taken out by the widow or children, in case the estate does not exceed

in value the sum of 100*l.*, through the agency of the Registrar of the County Court of the district. (36 & 37 Vict. c. 52.)

(*l*) *Johns v. Rowe*, Cro. Car. 106; stat. 29 Car. 2, c. 3; *Squib v. Wyn*, 1 P. Wms. 381.

(*m*) *Fawtry v. Fawtry*, 1 Salk. 36; Stra. 532. The court prefers a sole to a joint administration. See *Re Newbold*, Law Rep., 1 P. & D. 285.

ferred that are the nearest in degree to the intestate; but of persons in equal degree, the court may take which it pleases (*o*). 3. This nearness or propinquity of degree is reckoned according to the computation of the civilians, as expressed in the annexed Table (*p*): which allows one degree for each person in the line of descent, exclusively of him from whom the computation begins; and in the direct line counts the degrees from the deceased to his relative, but between collaterals, the sum of the degrees from the deceased to the common ancestor, and from the common ancestor to the relative. Wherein it differs (as regards collaterals) from the canonists, who begin from the common ancestor and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, consider them as related in that degree to each other (*q*). [And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration; for though both children and parents are in the first degree,—with us, the children are allowed the preference (*r*). Then follow brothers and

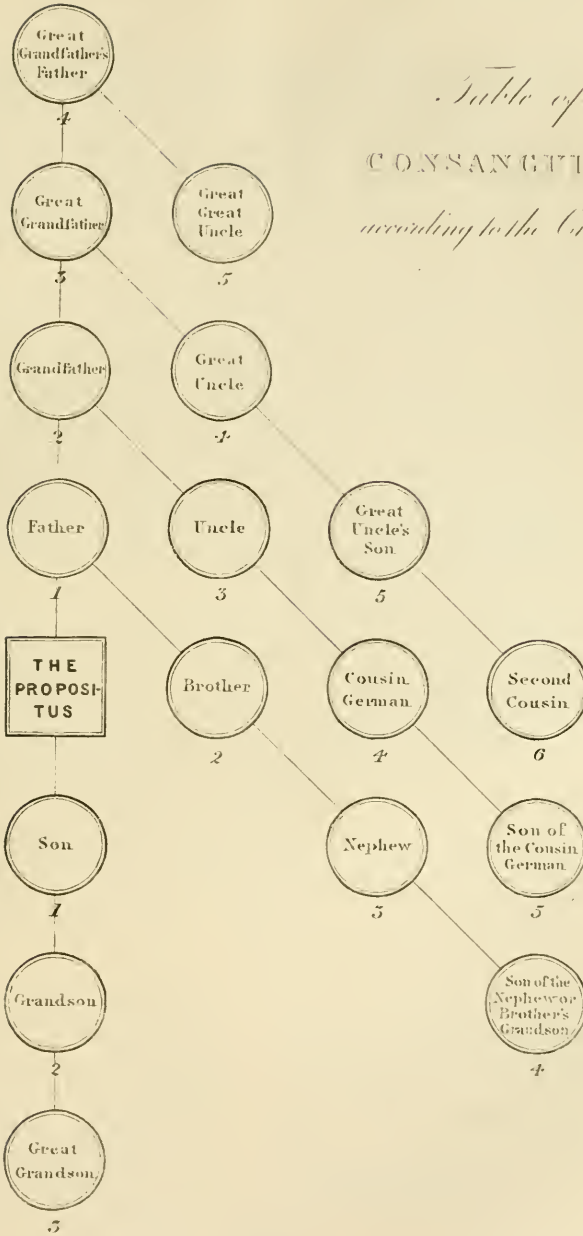
(*o*) The usual practice is to prefer males to females, unless the latter represent the majority of interests. See *Iredale v. Ford*, 1 Swab. & Trist, 305.

(*p*) *Proc. Chan.* 593; *Gilb. Ten.* 9; *R. v. Dr. Hay*, 1 Bl. Rep. 541.

(*q*) 2 Bl. Com. 206, 207, 504; *Toller's Executors*, 87—90, 2nd ed.; *Lloyd v. Tench*, 2 Ves. sen. 215.

(*r*) *Godolph.* p. 2, c. 35, s. 1; 2 Vern. 125; *Toller's Executors*, *ubi sup.* In Germany, there was a long dispute whether a man's children should inherit his effects during the life of their grandfather; which de-

pends on the same principles as the granting of administration. At last it was agreed at the diet of Arensberg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory; and so the law was established in their favour, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. (*Mod. Un. Hist.* xxix. 28.)



[sisters (*s*), and next to these, grandfathers and grandmothers: for though all these are in the second degree, yet we give the preference to brothers and sisters (*t*). Next to these are uncles and nephews (*u*), and the females of each class respectively; and lastly, cousins. 4. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate; and though they were formerly (as we have seen) excluded from the inheritance of *land*, yet this was upon feudal reasons only, which have nothing to do with personal estate (*x*). Therefore the brother of the half blood shall exclude the uncle of the whole blood (*y*); and the court may grant administration to the sister of the half, or the brother of the whole blood, at its own discretion (*z*). 5. No preference obtains between relatives *ex parte paternâ* and those *ex parte maternâ*, standing in the same degree of kindred to the deceased; but administration may be committed to either (*a*). 6. If none of the kindred will take out administration, a creditor may do it (*b*). 7. And lastly, the court may, in defect of all these, commit administration to such discreet person as it approves of (*c*); or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator: his only business being to keep the goods in his safe custody (*d*), and to do other acts for the benefit of such as are entitled to the property of the deceased (*e*). If a bastard (who has no kindred, being *nullius filius*), or any one else that has no kindred, dies intestate, and without wife or child, it was

(*s*) Pree. Chancery, 527; Blackborough v. Davis, 1 P. Wms. 41.

(*t*) Evelyn v. Evelyn, Amb. 191; 3 Atk. 762; Toller's Executors, 91.

(*u*) Blackborough v. Davis, 1 P. Wms. 41; S. C., 1 Salk. 251; Lloyd v. Tench, 2 Ves. sen. 213.

(*x*) Vide sup. vol. I. p. 422.

(*y*) 1 Vent. 425.

(*z*) See Aleyn, 36; Styl. 71.

(*a*) Moor v. Barham, 1 P. Wms. 53.

(*b*) Gidley v. Williams, Salk. 38. See Coombs v. Coombs, Law. Rep., 1 P. & D. 288.

(*c*) See Davis v. Chanter, 14 Sim. 212.

(*d*) Went. ch. 14.

(*e*) 2 Inst. 398.

[formerly held, that the ordinary might seize his goods and dispose of them *in pios usus* (*f*). But the usual course now is, for some one to procure letters-patent, or other authority from the Crown; and then the court will grant administration to such appointee of the Crown (*g*).]

In what has been stated on this subject, the administration granted is supposed to be a *general* one; as is always the case where the deceased died wholly intestate, without making either will or executor. But it may happen that he has made a will without naming any executor, or has named an incapable person; or the executor may refuse to accept the office, or may die intestate before he has administered (*h*). In any of these cases, the court will grant administration *cum testamento annexo*, to some other person; in the choice of whom it prefers the residuary legatee to the next of kin (*i*): and we are informed by Glanvil that this species of administration was in use so early as the reign of Henry the second (*k*). Again, if there be a sole executor who is under the age of twenty-one, a temporary administration *cum testamento annexo et durante minore ætate* may be granted to his guardian or such other person as the court shall think fit (*l*); for (by a provision of 38 Geo. III. c. 87, s. 6), probate must not be granted to the infant executor himself till he attains his majority;—though if there be several executors named, and any one of them be of full age, he may act without the co-operation of those under age (*m*). So also a temporary administration may be granted *durante absentia*,—as when an executor is out of the realm;

(*f*) Manning v. Napp, Salk. 37.

(*g*) Jones v. Goodchild, 3 P. Wms. 33.

(*h*) See 2 Bl. Com. 503, 505.

(*i*) 2 Bl. Com. 505; 1 Sid. 281; 1 Vent. 219; 1 Roll. Ab. 907; Comb. 20.

(*k*) "*Testamenti executores esse debent ii, quos testator ad hoc*

elegerit, et quibus curam ipse

commiserit; si vero testator

nullos ad hoc nominaverit, pos-

sunt propinqui et consanguinei

ipsius defuncti, ad id faciendum

se ingerere."—L. 7, c. 6.

(*l*) Vide sup. p. 190.

(*m*) 1 Wms. Exors. p. 222.

or *pendente lite*, where a suit is commenced touching the validity of a will (*n*).

[The title by administration never devolves from one person to another, by representative right; in which respect it differs from the title by will. For the interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself (*o*); and, however long may be the series of executors, the ultimate one is still the representative of A. But the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. (*p*). For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence,—but the administrator of A. is merely the officer of the court, in whom the deceased has reposed no trust at all: and therefore, on the death of that officer, it results back to the court, to appoint another. And, with regard to the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the court to commit administration afresh, of the goods of the deceased *not* administered by the

(*n*) As to administrations *pendente lite*, and other temporary administrations, see 20 & 21 Vict. c. 77, ss. 70—78; 21 & 22 Vict. c. 95, ss. 18, 20. *Veret v. Duprez*, Law Rep., 6 Eq. Ca. 329.

(*o*) See 25 Edw. 3, st. 5, c. 5; 1 Leon. 275. It is to be observed, however, that by 20 & 21 Vict. c.

77, s. 79, if an executor renounces—and by 21 & 22 Vict. c. 95, s. 16, if he dies without having taken probate, or if he does not appear when cited to take probate—his right in respect of the executorship ceases, as if he had not been appointed.

(*p*) Bro. Ab. tit. Administrator, 7.

[former executor or administrator. And such administrator *de bonis non* may (as well as an original administrator) have only a *limited* or *special* administration committed to his care, viz. of certain specific effects, such as a term of years, and the like; the rest being committed to others (*t*).]

Every person to whom administration is granted must give bond to the judge of the Court of Probate, (and, if so required, with one or more sureties,) conditioned for duly collecting and administering the estate. And if the condition shall be broken, the bond is to be assigned by the court to some person to be chosen for the purpose; and he is to sue upon the same in his own name, and to recover, as trustee for the parties interested, the full amount recoverable thereon (*u*).

IV. Our last general head of inquiry, involves the consideration of some of the chief points relative to the office of an executor or an administrator. And we will in the first place refer to the well-known principle applicable without distinction to both, that, in all matters in which the personal estate is concerned, they *represent* the person of the testator, as the heir does that of his ancestor (*x*); so that they, together with the heir of a deceased party, are sometimes compendiously described as his *real and personal representatives*. And in illustration of this principle, we may further observe, that the executor or administrator has the same property in the chattels of the deceased (including his chattels *real*), as he himself had when living (*y*); and, in general, succeeds to

(*t*) 1 Roll. Abr. 908; Godolph. p. 2, c. 30; Salk. 36.

(*u*) 20 & 21 Vict. c. 77, ss. 81—83; 21 & 22 Vict. c. 95, s. 15. As to the bond, see *Sandrey v. Michell*, 3 B. & Smith, 405. As to when it will be assigned, In the goods of Young, Law Rep., 1 P. & D. 186.

(*x*) Co. Litt. 209.

(*y*) By 8 & 9 Vict. c. 97 (altering the provisions of 1 Geo. 1, c. 19, and other Acts relating to testamentary dispositions of property in the public funds), it is provided, that, notwithstanding any specific bequest of any public stock standing in the

his rights of action; and that he is subject, on the other hand—so far as the *assets* in his hands are concerned—to his liabilities (*z*). [As to the duties incumbent upon executors and administrators respectively, these are in general very much the same; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor; and, secondly, that an executor may do many acts before he proves the will (*a*), but an administrator may do nothing till letters of administration are issued (*b*). For the former derives his power from the will and not from the probate; the latter owes his entirely to the appointment of the court (*c*). If any person takes upon him to act in the affairs of the deceased, without any just authority,—as by intermeddling with his goods, and many other transactions,—he is called in law an executor of his own wrong, *de son tort* (*d*); and is liable to all the trouble of an executorship, without any of

books of the governor and company of the Bank of England, such stock may be transferred by the executor, or administrator *cum testamento annexo*, of the party making such bequest,—after probate of the will, or the letters of administration, shall have been left at the bank for registration.

(*z*) See 4 Edw. 3, c. 7; 3 & 4 Will. 4, c. 42; Powell *v.* Rees, 7 Ad. & El. 426; Wentworth *v.* Cock, 10 Ad. & El. 42; Prior *v.* Hembrow, 8 Mec. & W. 873. The word *assets* is applied to personal estate in the hands of the executor or administrator, as well as to real estate in the hands of the heir. (As to its use in the latter sense, vide sup. vol. I. p. 432.) Independently of his liability in respect of *assets*, an

executor may, in certain cases, become *personally* liable upon contracts made by himself, though made in his representative character. On this subject, see Waite *v.* Gale, 2 Dowl. & L. 925.

(*a*) Wentw. ch. 3; 1 Salk. 299; Whitehead *v.* Taylor, 10 Ad. & El. 210.

(*b*) See Lucy *v.* Walrond, 3 Bing. N. C. 841. As to the doctrine of *relation*, by which the letters of administration are held to relate back to acts done between the death and their being taken out, see Morgan *v.* Thomas, 8 Exch. 302; Bodger *v.* Arch, 10 Exch. 333.

(*c*) Comyns, 151.

(*d*) 5 Rep. 53; Wentw. ch. 14; stat. 43 Eliz. c. 8.

[the profits or advantages (*e*). But merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse, will not amount to such intermeddling as will charge a man as executor of his own wrong (*f*). An executor *de son tort* cannot bring an action himself in right of the deceased; but actions may be brought against him (*g*); and he is chargeable with the debts of the deceased, so far as assets come to his hands (*h*); though, as against creditors in general, he is allowed all payments made to any other creditor in the same or a superior degree, himself only excepted (*i*). And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages (*k*); unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt (*l*).] But let us now see what are the power and duty of an executor duly appointed, premising only that wherever he finds any difficulty he may always protect himself from responsibility, by applying to have the estate administered, under the direction of the Court of Chancery; and that what is here stated as to the position of an executor, will be found to apply in general to that of an administrator also (*m*).

1. [He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts

(*e*) *Carmichael v. Carmichael*, 2 Phill. 101. See also *Meyrick v. Anderson*, 14 Q. B. 726; *Hill v. Curtis*, Law Rep., 1 Eq. Ca. 90; *Sykes v. Sykes*, ib., 5 C. P. 113.

(*f*) *Dyer*, 166. See *Serle v. Waterworth*, 4 Mee. & W. 9.

(*g*) Bro. Ab. tit. Administrator, 8.

(*h*) *Dyer*, 166; *Meyrick v. Anderson*, ubi sup.

(*i*) 1 Chan. Cas. 33; 5 Rep. 20; *Moor*, 527. As to the effect of payments made to an executor *de son tort*, see *Thompson v. Harding*, 2 Ell. & Bl. 630.

(*k*) 12 Mod. 441; *Parker v. Kett*, ubi sup.

(*l*) *Wentw. ch.* 14.

(*m*) See 15 & 16 Vict. c. 86, ss. 45, 46; et post, bk. V. c. XIII.

[and charges (*n*). But if he be extravagant, or misapply the assets in this or in any other particular, it amounts in technical language to a *devastavit*; that is, to a devastation or waste of the substance of the deceased: and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased (*o*).

2. He must, in the next place, *prove the will* of the deceased;—or (as it is otherwise expressed) take out *probate*; and in default of any will, the person entitled to be administrator must also, at this period, take out letters of administration (*p*);—of both which proceedings enough has been already said.

3. He must also make an *inventory* of all goods and chattels; or in other words of all personal estate, including chattels real, whether in possession or action, of the deceased; and this inventory he is to deliver in to the court, upon oath, if and when thereunto lawfully required (*q*).]

4. He is to *collect* all the goods and chattels so inventoried; and to that end is to commence suit or action, if necessary against persons who withhold them (*r*). And inasmuch as all the personal estate of the deceased, whether in possession or in action (desperate debts excepted), is *assets* in the hands of his personal representative, and makes him liable to creditors so far as such property extends (*s*),—he is allowed to sell so much of it as does not already consist of money, in order to answer the

(*n*) As to funeral expenses, see *Hancock v. Podmore*, 1 Barn. & Adol. 260; *Bisset v. Antrobus*, 4 Sim. 512; *Corner v. Shew*, 3 Mee. & W. 356.

(*o*) *Shelley's case*, 1 Salk. 296; *Godolph. p. 2*, c. 26, s. 2; *Camden v. Fletcher*, 4 Mee. & W. 378.

(*p*) If the administration be of a special or temporary kind (as explained sup. p. 196), the deceased having left a will, such will must of course be proved by the adminis-

trator so appointed.

(*q*) Stat. 21 Hen. 8, c. 5. See *Griffiths v. Antony*, 5 Ad. & El. 623.

(*r*) As to the production of probate or grant in an action so brought, see *Webb v. Atkins*, 14 C. B. 401. As to the liability of an executor or administrator to *costs*, see 3 & 4 Will. 4, c. 42, s. 31; *Farley v. Briant*, 3 Ad. & El. 839.

(*s*) As to assets, vide sup. p. 199, n. (*z*).

demands that may be made upon him. And on this subject it may be worth remark, that if there be two or more executors who have proved the will, a sale, receipt or release by one of them shall be good against all the rest (*u*).

5. He must *pay* the *debts* of the deceased (*x*); and in payment of debts must observe the rules of priority, according to the several degrees which the law has established in this matter, and he may in his discretion pay a debt barred by the statutes of limitation (*y*). And, first, he must pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the Crown, on record or other specialty (*z*). Thirdly, such debts, as are, by particular statutes, to be preferred to all others; of which there are some miscellaneous instances in the statute book (*a*). Fourthly, debts of record: such

(*u*) Dyer, 23. It may be observed, however, that the Bank of England are authorized, before they allow a transfer of the stock of a deceased party standing in their books, to require that *all* the executors who have proved shall join (8 & 9 Vict. c. 97, s. 1). It has been doubted, moreover, whether a sale or release by one of two or more *administrators*, is also good as against the rest (see per Lord Hardwicke, in *Hudson v. Hudson*, 1 Atk. 460); but in the courts of common law, at all events, executors and administrators have been said to stand in this respect, as in others, on the same footing (per Sir J. Strange, *Jacomb v. Harwood*, 2 Ves. sen. 267). But the point seems not conclusively settled. See Selwyn, N. P. 11th edit. p. 784, *in notis*, and Williams' Law of Executors, p. 889, n. (*e*), 6th edit.

(*x*) By "Locke King's" Act (17 & 18 Vict. c. 113, explained by

30 & 31 Vict. c. 69,) the heir or devisee of any real estate under mortgage is not to be entitled to have the mortgage discharged out of the personal estate, or out of any other real estate, of the deceased, but the lands mortgaged shall be primarily liable—unless the testator shall in his will declare expressly or by necessary implication an intention to the contrary. This, however, is to be without prejudice to the right of the mortgagee to obtain full payment, either out of the personal estate or otherwise. As to the above statute, see Maxwell *v. Hyslop*, Law Rep., 4 Eq. Ca. 407; *Brownson v. Lawrance*, ib., 6 Eq. Ca. 1; *Nelson v. Page*, ib., 7 Eq. Ca. 25; *Coote v. Lowndes*, ib., 10 Eq. Ca. 376.

(*y*) *Lewis v. Rumney*, Law Rep., 4 Eq. Ca. 451.

(*z*) 1 And. 129.

(*a*) See 17 Geo. 2, c. 38; 33 Geo. 3, c. 54, s. 10, &c.

as debts due on judgments (*b*) and recognizances (*c*); and amongst debts of this degree are to be reckoned also decrees in equity (*d*) and orders in bankruptcy (*e*). Fifthly, all other debts *pari passu*—whether they are on simple contract, (that is, on contract by writing unsealed or without writing,) or whether they arise or are secured by any bond, deed, or other instrument under seal or otherwise made or constituted a specialty debt (*f*). Among debts of equal degree, the executor, if a creditor of the testator, is allowed to pay himself first, by retaining in his hands so much as his debt amounts to (*g*). But an executor of his own wrong is not allowed to retain; for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law (*h*). Also among several creditors of equal degree, he shall be first paid who shall first obtain judgment for his debt; and the executor or administrator cannot resist his action on the ground that nothing will be left for the other creditors. He may resist it, however, on the ground that there is not enough to pay a creditor of higher degree. And this

(*b*) In order to take preference over heirs, executors, or administrators, the judgment must be duly registered under 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112.

(*c*) 4 Rep. 60; Cro. Car. 363. As to debts of record, vide sup. p. 143.

(*d*) *Shafto v. Powell*, 3 Lev. 355; *Morrice v. The Bank of England*, 3 Swanst. 573.

(*e*) 32 & 33 Vict. c. 71, s. 65.

(*f*) 32 & 33 Vict. c. 46. Prior to this Act, specialty debts were preferred to such as arose on simple contract. Blackstone says (vol. ii.

p. 511), that “servants’ wages are by some with reason preferred to any other debts of this last class; and so stood the antient law according to Bracton and Fleta, who reckon among the first debts to be paid *servitia serrientium et stipendia famulorum*,” and cites 1 Roll. Abr. 927; Bracton, lib. 2, c. 26; Fleta, lib. 2, c. 56, s. 10.

(*g*) *Cock v. Goodfellow*, 10 Mod. 496. As to retainer, see 1 Roll. Abr. 922; Plowd. 543; *Glaholm v. Rowntree*, 6 Ad. & El. 710.

(*h*) 5 Rep. 30.

defence he is *bound* to make, if he have notice that a higher debt is outstanding (*k*); for otherwise, on deficiency of assets, he must answer for it out of his own estate: and of all debts of record he has notice by construction of law (*l*). If after exhausting the whole assets which have come to his hands, by the due payment of debts, he be afterwards sued by a creditor remaining unpaid, he is entitled to defend himself by proving that he has fully administered, which is called a plea of *plene administravit* (*m*). And upon this plea, the creditor is only entitled to judgment that he shall be paid out of any future assets that shall come to the defendant's hands; which is called a judgment of assets *in futuro* or *quando acciderint* (*n*).

6. [When the debts are all discharged (*o*), the *legacies*

(*k*) Dy. 32; 2 Leon. 60; Sawyer v. Mercer, 1 T. R. 690.

(*l*) 2 Bl. Com. p. 511.

(*m*) As to this plea, see Palmer v. Waller, 1 Mee. & W. 689; Smith v. Day, *ubi sup.*; Glaholm v. Rowntree, 6 Ad. & El. 710; Dawson v. Gregory, 7 Q. B. 757.

(*n*) By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 91, proceedings against executors upon a judgment of assets *in futuro*, may be as provided by the 15 & 16 Vict. c. 76, as to *writs of revivor*. (As to writs of revivor, vide post, book v. c. x.)

(*o*) It will be desirable to notice in this place the following enactments for the protection of an executor (or administrator).

By 13 & 14 Vict. c. 35, ss. 19—25, and 23 & 24 Vict. c. 38, s. 14, he may obtain a Chancery order at chambers, for taking an account of the outstanding debts and liabilities

with which he has to deal.

By 22 & 23 Vict. c. 35, ss. 27, 28, if liable on a lease granted to the deceased, or on the conveyance of property to him subject to a chief rent or rent-charge, he may,—after assigning or conveying such lease or property to a purchaser, and following in other respects the course pointed out by the Act,—proceed to distribute the assets without being personally responsible for claims which may afterwards accrue due under such lease or conveyance.

By the same Act (sect. 29), if he shall give proper notices to creditors and others to send in their claims, as directed in the statute, he is enabled afterwards, when the time named in the notices has expired, to distribute the assets among the parties entitled, of whose claims he has been then apprised. (See Clegg v. Rowland, L. R., 3 Eq. Ca. 368).

By the same Act (sect. 30) and

[claim the next regard; which are to be paid by the executor so far as his assets will extend (*p*); but he may not give himself the preference herein, as in the case of debts (*q*).

A legacy is a bequest by will of goods and chattels—including in that term chattels real (*r*). Such bequest, on the death of the testator, transfers to the legatee an inchoate property in that which is given, but his interest therein is not perfect without the assent of the executor. For if I have a *general* or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor (*s*). For in him all the chattels are vested in the first instance; and it is his business to see whether there is a sufficient fund to pay all the debts of the testator (*t*); the rule of equity being, that a man must be just before he is permitted to be generous;

23 & 24 Vict. c. 38, s. 9, he may apply to the Court of Chancery, for advice or direction respecting the administration of the assets; and if he acts under such advice or direction, he will be discharged so far as regards his own responsibility.

By 23 & 24 Vict. c. 145, s. 30, it is made lawful for executors to pay debts or claims upon any evidence that they may think sufficient; and to accept any composition or security for debts due to the deceased; and to allow time for payment of any such debt: and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever, without being responsible for any loss occasioned thereby. (See also the enactments relative to trustees generally, mentioned post, vol. IV. bk. v. ch. XIII.; and 30 & 31 Vict. c. 132, as to the securities in which trust funds

may be invested by executors or administrators.)

(*p*) He must, however, retain the *legacy duty*, and pay it over to the commissioners of inland revenue.

(*q*) 2 Vern. 434; 2 P. Wms. 25. As to the *remedy* of a legatee against the executor, &c., in case of non-payment of a legacy, vide post, p. 213.

(*r*) By the Succession Duty Act, 1853 (16 & 17 Vict. c. 51, s. 19), no legatee shall be chargeable with legacy duty, in respect of any *leasehold hereditaments* of the testator, as belonging to the personal estate; but he is made liable to pay in respect thereof, *succession* duty under that Act.

(*s*) See Co. Litt. 111; Ayleyn, 39; Richards v. Browne, 3 Bing. N. C. 493.

(*t*) Smith v. Day, 2 Mee. & W. 684.

[or as Bracton expresses the sense of our antient law, “*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis*” (u). And in case of a deficiency of assets, all the *general* legacies must abate proportionably; nay, even if the legatees have been paid, they are bound to refund a rateable part, in case debts come in afterwards more than sufficient to exhaust the *residuum* after the legacies paid (x). And this law is as old as Bracton and Fleta, who tell us, “*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio*” (y). However, a *specific* legacy of a piece of plate, a horse, or the like, is not to abate at all, unless there be not sufficient without such abatement to pay the debts of the deceased (z).] But, on the other hand, it is liable to *ademption*; which arises where the thing so bequeathed is afterwards disposed of in some other manner, by the testator himself before his death: and where a specific legacy is thus adeemed, the legatee has no longer any claim under the will (a).

If the legatee dies before the testator, the legacy is in general lost or *lapsed*, and shall sink into the *residuum*. But by a provision in the New Will Act, (7 Will. IV. & 1 Viet. c. 26, s. 33,) referred to in the chapter on Devises, an exception to this rule is now introduced, in the case where the bequest is to a child, or other issue of the testator, for any estate or interest not determinable at or before the death of the legatee, and the legatee leaves issue, who survives the testator, and no intention to ex-

(u) L. 2, c. 26.

(x) *Newman v. Barton*, 2 Vern. 205.

(y) Bract. l. 2, c. 26; Fleta, l. 2, c. 57, s. 11.

(z) 2 Vern. 111. Where the assets are deficient, debts are to be

preferred to specific legacies. (*Richards v. Browne*, 3 Bing. N. C. 493.)

(a) See *In re Gibson*, *Matthews v. Foulsham*, Law Rep., 2 Eq. Ca. 669; *Dawson v. Dawson*, 4 Eq. Ca. 504; *Nevin v. Drysdale*, *ibid.* 517.

clude such issue appears on the face of the will (*b*). If a *contingent* legacy be left to any one, as *when* he shall attain, or *if* he attain, the age of twenty-one, and he die before that time, it is a lapsed legacy, even though he survive the testator (*c*). However, a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsenti*, although it be *solvendum in futuro*: and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate (*d*). But on the other hand, if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir, unless there be something further in the will, sufficient to show an intention to the contrary (*e*). If a legacy, due immediately, be charged on land, interest shall be payable thereon from the testator's death (*f*); but if not so charged, it will only carry interest (at the rate of 4*l.* per cent. per annum) from the end of the year after the death of the testator; for that is the time allowed by law to the executors for the payment of legacies (*g*).

By another species of contingent legacy, personal estate is sometimes bequeathed to A., and upon his dying *without issue*, then over to B. This was formerly considered as importing an indefinite failure of issue; and the bequest over was consequently held to be void, as too remote and tending to perpetuity (*h*). But a contrary rule is now

(*b*) Vide sup. vol. I. pp. 606, 607.

(*c*) Dyer, 59; 1 Eq. Cas. Ab. 295; 2 Bl. Com. 513. See Locke v. Lamb, Law Rep., 4 Eq. Cas. 372.

(*d*) Blackstone says (vol. ii. p. 513), that this distinction is borrowed from the civil law, and cites Ff. 35, l. 1, 2. He also remarks that its adoption in our ordinary courts of law is owing to its having been before adopted in the Ecclesiastical Courts; and cites 1 Eq. Cas. Ab. 295.

(*e*) Duke of Chandos v. Talbot,

2 P. Wms. 601; see Co. Litt. by Butl. 237 a, note (1).

(*f*) 2 Bl. Com. p. 513.

(*g*) Maxwell v. Wettenhall, 2 P. Wms. 26, 27. In case, however, of a specific legacy of *stock*, such legacy will carry the dividends from the testator's death. (Kirby v. Potter, 4 Ves. 751; Barrington v. Tristram, 6 Ves. 349.)

(*h*) Fearn, Cont. Rem. 485, 9th edit. As to perpetuity, see vol. I. p. 552.

established by 7 Will. IV. & 1 Vict. c. 26, s. 29, as more particularly explained in our chapter on Devises (*h*). For, by that provision, this expression is now to be construed (unless a contrary intention appear on the face of the will) as importing a failure of issue in the lifetime or at the death of A. Such a bequest, as that just mentioned, will, consequently, now be good.

7. When all the debts and particular legacies are discharged, the surplus, or *residuum*, must be paid to the residuary legatee, if any be appointed by the will (*i*), and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship (*k*). That doctrine, however, was afterwards understood as subject to this restriction, that wherever there was sufficient on the face of the will to show that the executor was *not* intended to have the residue, it should go to the next of kin (*l*). And it has since been provided by 11 Geo. IV. & 1 Will. IV. c. 40, that unless it shall appear on the will that the executor *was* intended to have the residue, he shall be deemed by a court of equity a trustee for such persons (if any) as would be entitled (had the testator died intestate) to claim as next of kin under the Statute of Distributions, now about to be mentioned (*m*).

8. In the case of intestacy—to turn to the position of an administrator as distinct from that of an executor—and in relation to the *residuum* which there may be after payment of debts, it was also formerly much doubted whether or no the administrator could be compelled to

(*h*) Vide sup. vol. I. p. 610.

(*i*) It may be here remarked, that before paying over such residuum, the executor must pass his *residuary account* before the Board of Inland Revenue, setting forth, in the prescribed form, the particulars of the assets of the estate and of the payments made thereout,—the duty (which is payable as well on the

residuum as on the particular legacies) being calculated on the balance found.

(*k*) Perkins, 525.

(*l*) 2 Bl. Com. 515; 11 Geo. 4 & 1 Will. 4, c. 40.

(*m*) See *Love v. Gaze*, 8 Beav. 472; *Bird v. Harris*, Law Rep., Eq. Ca. 204.

make any distribution of the intestate's estate (*n*). [For though—after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased,—the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, such bonds were prohibited by the temporal courts, and declared void at law (*o*). But now these controversies are quite at an end; for by the Statute of Distributions (22 & 23 Car. II. c. 10), explained by 29 Car. II. c. 3, it is enacted, that the surplusage of intestate's estates,—except of *femes covert*, the administration and enjoyment of whose estates belong, by the principles of the common law, to their husbands,—shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner:—one third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if they be dead, to their representatives, that is, their lineal descendants; if there are no children or legal representatives of such children subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, and their representatives: if no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters (*p*). The next of kindred here referred to, are to be ascertained by the same rules of consanguinity, as those which indicate who are entitled to letters of administration, of which we have sufficiently spoken (*q*). And therefore by 22 & 23 Car. II. c. 10, the father, or, if he were dead, the mother, succeeded to all

(*n*) Godolph. p. 2, c. 32.

(*o*) *Hughes v. Hughes*, 1 Lev. 233; Cart. 125; *Edwards v. Freeman*, 2 P. Wms. 447.

(*p*) Raym. 496; Lord Raym.

571; *Pett's case*, 1 P. Wms. 27; see 1 Chit. Gen. Pract. of the Law, 108, where a Table of Distributions is given.

(*q*) Vide sup. p. 194.

[the personal effects of their children who died intestate and without wife or issue; in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

It is obvious to observe how near a resemblance this Statute of Distributions bears in some particulars, to our antient English law, *de rationabili parte bonorum*, spoken of at the beginning of this chapter; and which Sir Edward Coke himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding, (in point of conscience at least,) upon the administrator or executor, in the case of either a total or partial intestacy (*r*). It also bears some resemblance to the Roman law of succession *ab intestato* (*s*); which, and because the Act was also penned by an eminent civilian (*t*), has occasioned a notion that the parliament of England copied it from the Roman prætor (*u*). So likewise there is another part of the Statute of Distributions, where directions are given that no children of the intestate

(*r*) 2 Inst. 33; see *Petit v. Smith*, 1 P. Wms. 8.

(*s*) The general rule of such succession was this:—1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood; or, if the parents were dead, all the brothers and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. (Ff. 38, 15;

1 Nov. 118, c. 1, 2, 3; 127, c. 1.)

(*t*) Sir Walter Walker; see per Holt, C. J., in 1 Ld. Raym. 574.

(*u*) Blackstone (vol. ii. pp. 516, 520) proceeds to intimate a doubt of this, as the law of *pars rationabilis* prevailed “from the time of Canute downwards, many centuries before “Justinian’s laws were known or “heard of in the western part of “Europe.” But it might have been drawn, as he himself afterwards admits, from the Roman law, at a period earlier than that of Justinian.

[(except his heir at law) on whom he has settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal(*x*). This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law; which it certainly resembles in some points, though it differs widely in others(*y*). But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the antient custom of London(*z*), of the province of York, and of the kingdom of Scotland(*a*); and that, with regard to lands descending in coparcenary, it hath always been, and still is, the common law of England, under the name of *hotchpot* (*b*).

It must be acknowledged, however, that the doctrine and limits of representation laid down in the Statute of Distributions seem to have been principally borrowed from the civil law; whereby it will sometimes happen that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that *per stirpes* only(*c*). They are divided *per capita*,—to every man an equal share,—when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repræsentationis*, in the right of another person. As if the next of kin be the intestate's three brothers, A., B. and C.; here his effects are divided into three equal portions, and distributed *per capita*, one

(*x*) As to advances to children, see *Stares v. Penton*, Law Rep., 4 Eq. Ca. 40; *Boyd v. Boyd*, ib. 305. As to the presumption against "double portions," see *Lord Chichester v. Coventry*, ib., 2 App. Ca. 71.

(*y*) Ff. 37, 6, 1.

(*z*) See *Kemps v. Kelsey*, Prec. Ch. 596.

(*a*) Ersk. Inst. b. 3, tr. 9, ss. 24, 25.

(*b*) Vide sup. vol. I. p. 348.

(*c*) Vide sup. vol. I. p. 407.

[to each: but if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two; then the distribution must have been *per stirpes*; viz. one-third to A.'s three children, another third to B.'s two children, and the remaining third to C., the surviving brother. But if C. had also been dead, without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz. each of them one-fifth part (*d*).]

By the Statute of Distributions the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects, were expressly excepted and reserved. So that, though in those places the restraint of *devising* had been removed by the statutes formerly mentioned (*e*); their antient customs with respect to the estates of intestates long remained in full force (*f*).

Any special customs, however, concerning the distribution of estates in these or other places have now wholly ceased and determined; save only with respect to the estates of those who may have died on or before the 31st December, 1856. For by 19 & 20 Viet. c. 94, it was enacted, that the distribution of the personal estate of all persons dying intestate on or after the 1st January, 1857, should take place, as if the rules for the distribution of the personal estates of intestates generally prevalent in the province of Canterbury, had prevailed throughout England and Wales,—any law, custom or statute to the contrary notwithstanding.

(*d*) Prec. Chanc. 54.

(*e*) Vide sup. p. 181.

(*f*) An account of these peculiar customs in some places with regard to the estates of intestates will be found in Blackstone (vol. ii. pp. 518, 519). Thus, in London, if the deceased left a widow and children, her apparel and bedroom furniture, (called the *widow's chamber*),

was first set aside for her own use, and the residue divided into three parts, whereof she took one, the children another, and the administrator the third; which last, or *dead man's part*, (till the statute 1 Jac. 2, c. 17,) the administrator was wont to retain for his own use. (See *Matthews v. Newby*, 1 Vern. 133).

We have thus taken some general view of the duty of the personal representative, in respect to his administration of the estate of the deceased. It only remains to add, that this branch of the law has been variously distributed in point of jurisdiction. For the Court of Probate, though it has had an exclusive province in the matter of probates and administrations, has not been able to entertain suits against executors or administrators to compel them to pay the debts, legacies, or distributive shares of residues, which are due from the estate of the testator or intestate; and the enforcement of their duty, as regards the two last of these subjects, has belonged exclusively (among the superior courts) to the Court of Chancery (*g*). As regards the first, (viz. the payment of debts,) the enforcement of their duty has belonged, in one point of view, to the Court of Chancery; in another, to the superior courts of the common law, viz. the Queen's Bench, Common Pleas, and Exchequer. For payment of the debts due from the estate of the deceased is part of the relief afforded in proceedings in equity for the administration of assets; and, upon the death of a debtor, the right of maintaining an action to recover the debt survives against his executors or administrators (*h*).

(*g*) A superior court of the common law has had no power to entertain an action for a distributive share of residue; nor for a legacy, except in the particular case where the action is brought by the legatee of a chattel specifically bequeathed, and to the bequest of which the executor has assented. (See *Doe v. Guy*, 3 East, 123; *Jones v. Tanner*, 7 Barn. & Cress. 542; *Williams' Executors*, p. 1783, 6th ed.) On the other hand, both a distributive share and a legacy (general or specific) may be recovered in the *county court* (which now possesses an equit-

able as well as a legal jurisdiction,) where the estate does not exceed in value the sum of 500*l*. (See 28 & 29 Vict. c. 99.)

(*h*) Upon the commencement of the Judicature Act, 1873 (36 & 37 Vict. c. 66), on the 2nd November, 1874, the distinctions adverted to in the text will lose their importance in regard to future cases,—inasmuch as the High Court of Justice by that Act established, will have jurisdiction to entertain all matters and causes arising for decision, in one or other of its five divisions.

CONCLUSION.

ON SOME MIXED OR IRREGULAR SUBJECTS OF PROPERTY.



We have thus made a general survey of the law of property, under its great divisions of "things real" and "things personal," which form, as we have seen, two distinct classes of subjects, strongly distinguished from each other, not only as regards the natural qualities of immobility on the one hand, and mobility on the other, but also as regards the legal constitution and incidents to which each class is respectively liable. There is, however, no science which admits of an arrangement so perfect as to be subject to no anomalies; and in the law of property there are, accordingly, some few cases of irregular character, with the consideration of which we will close the second book of these Commentaries.

First, then, there are certain matters falling within the definition of things real, which are attended, nevertheless, with some of the legal qualities of things personal; and, again, there are others which, though things personal in point of definition, are, in respect of some of their legal qualities, of the nature of things real. Of these, in their order.

The subjects which present themselves for notice, under the first head, are as follows:—

1. *Fructus*—or the growing crops of those agricultural productions of the soil, which are annually produced

by the labour of the cultivator. All natural growths (it is to be observed), until actually severed from the soil, are in legal contemplation parcel of the realty, not less than the soil itself; but, upon severance, change their character, and are converted into personalty. They are consequently governed, when in the first predicament, by all those rules as to estate and title which are incident to things real; when in the second, by all those which attach to things personal. Thus trees, while still implanted in the ground, are parcel of the freehold; and as such will pass, on the death of the owner thereof, to his heir or devisee: but, when felled or blown down, become part of his personal estate; and, at his decease, will consequently belong to his executor or administrator.

To this general doctrine, however, there is an exception in the case of the *fructus industriales*, such as are above described under the name of emblements; for these, though still in union with the soil, follow, nevertheless, in several particulars, the nature of personal, as distinguished from real estate

For in the first place, emblements may be lawfully severed from the soil, and removed by the tenant whose cultivation has produced them, though his interest in the land may be too limited to entitle him to cut down trees or the like. And, as shown in a former part of the work, a tenant, whose estate determines at a period which he was not in a condition to foresee, is entitled to cut and carry away, when ripe, even after his tenancy has determined, the emblements which he himself has sown or planted; and to convert them to his own use, as his own goods and chattels (*a*).

Again, upon the death of a terretenant seised in fee,

(*a*) Vide vol. I. pp. 260, 289, where it is shown that in some cases the common law right of the tenant as to conveying away emblements after the determination of the te-

nancy, is superseded by a new species of protection afforded by 14 & 15 Viet. c. 25; but that otherwise it is in full force.

the emblements on his land will devolve, by the rule of law, upon his executor, or in case of his intestacy, on his administrator; and will not (in such last case) descend, like the land itself, to his heir: for which the reason seems to be, that they were sown by him with the intention of being reaped, and of being thus ultimately converted into personal estate. The law, however, makes in this case a distinction between an heir and a devisee: for a devise to a man of a particular piece of land, will suffice to carry also the emblements growing thereon at the testator's death; because in giving the principal subject he shall be presumed to mean to give it with the attendant advantages (*b*).

Further, the emblements of a *terretenant* are subject, like his moveables, to be distrained upon for any arrears of rent that he may owe to his landlord. Formerly, indeed, this was otherwise: for at common law it was the moveables only of the tenant that were liable to a distress; and the emblements were considered, for this purpose, as parcel of the freehold itself, and were consequently exempt (*c*). But now by stat. 11 Geo. II. c. 19, landlords are permitted to distrain corn, grass, hops, or other produce of a similar nature, growing on the demised premises (*d*).

In case of a judgment also against the *terretenant*, his emblements are liable to be taken upon any writ of execution, which directs a seizure of his goods and chattels: a rule not introduced, like the last, by statute; but the effect of legal construction, founded on the similarity which exists, in other particulars, between the law of emblements and that of personal property: and more par-

(*b*) *Anon.*, Cro. Eliz. 61; *West v. Moore*, 8 East, 339; Co. Litt. by Hargrave, 55 b. See also *Cooper v. Woolfit*, 2 H. & N. 122.

(*c*) 1 Roll. Abr. 666; *ibid.* pl. 4;

3 Bl. Com. 9, 10; Co. Litt. by Harg. 47 b, n. (1).

(*d*) *Clark v. Gaskarth*, 8 Taunt. 431; *Clark v. Calvert*, *ibid.* 742. See 56 Geo. 3, c. 50, s. 6; 14 & 15 Vict. c. 25, s. 2.

ticularly on the circumstance of their devolving on the personal representative, and not on the heir (*e*).

We may dismiss the subject of emblements with the remark, that they comprise, by their definition, not only corn of all kinds, but other annual products of the labour of the cultivator, such as hops, hemp, flax, saffron, melons, cucumbers, turnips, and carrots (*f*),—but that, on the other hand, fruits on the tree, and the natural grasses, are not emblements (*g*).

2. *Fixtures*;—which may be defined as things of an accessory character, annexed to houses or lands; and in that sense will include, not only such matters as grates in a house, or steam engines in a colliery, which follow in some respects the law of personal chattels; but such things also as windows and palings, which are for every purpose parcel of the realty. The definition, however, implies, that, to be a fixture, the thing must not constitute part of the principal subject, as in the case of the walls or floors of a house (*h*); and that, on the other hand, it must be in some actual union or connection with the principal subject,—and not merely brought into contact with it, as in the case of a picture suspended on hooks against a wall, or a wooden barn resting, by its weight alone, upon a brick foundation (*i*).

By an antient rule of the common law (the result, per-

(*e*) Gilb. Exce. 19; Poole's case, 1 Salk. 368; Peacock v. Purvis, 2 Brod. & Bing. 368.

(*f*) Co. Litt. 55b; Toller, Exce. 193.

(*g*) 2 Bl. Com. 123; Toller, Exce. 193.

(*h*) The term *fixtures* (which is popular in its origin, though it seems now to be fully incorporated into the language of the law,) is not used with much uniformity of meaning. It is often taken to express such annexations only as are *legally remov-*

able; and this use of it is preferred, in an able treatise, to the more general one adopted in the text. (See Amos on Fixtures.) But it seems more convenient to understand it in a sense suitable to the popular distinctions between landlord's and tenant's fixtures, and fixtures removable and irremovable. (See 2 Smith's Leading Cases, 114; and Elliott v. Bishop, 11 Exch. 113.)

(*i*) Elwes v. Maw, 3 East, 55; and see Wiltshire v. Cottrell, 1 Ell. & Bl. 674.

haps, of that paramount regard which in former times was paid to land as compared with personal property), every fixture, or thing annexed to the realty, becomes immediately on the annexation, part of the realty itself; the maxim being, that *quicquid plantatur solo, solo cedit* (*k*). This of course implies that, in a general point of view, the fixture is thereafter governed by the same law which applies to the land, or other subject real, with which it is incorporated, and that it ceases to follow the law of personalty (*l*). Yet there are numerous cases in which the contrary is true, and in which the fixture retains, after its annexation, the quality, in certain respects, of a personal chattel; being in truth exceptions gradually established, by the course of judicial decision upon the ordinary rule which merges the fixture in the freehold, because reason and convenience seemed evidently to require that rule to be so qualified (*m*). These cases are as follows:—

First, as between the heir (or devisee) and the personal representative of the tenant in fee, though the fixtures will in general follow the land, yet such of them as are put up merely for ornament or domestic use are understood to devolve to the personal representative, provided at least they are capable of removal without material damage to the freehold, and are not essential to its enjoyment (*n*). And the same rule, subject to the same qualification, seems to apply to such as are placed or erected for purposes connected with trade (*o*).

Next, as between the tenant of a particular estate and

(*k*) *Lee v. Risdon*, 7 Taunt. 191. But this maxim may yield to the particular circumstances of the case. See an example, *Lancaster v. Eve*, 5 C. B. (N. S.) 717.

(*l*) See *Horn v. Baker*, 9 East, 215; *Minshall v. Lloyd*, 2 Mee. & W. 450; *Macintosh v. Trotter*, 3 Mee. & W. 184; *Sheen v. Rickie*, 5 Mee. & W. 175.

(*m*) *Buckland v. Butterfield*, 2 Brod. & Bing. 54.

(*n*) 2 Bl. Com. 428; *Amos on Fixtures*, 157; 1 Williams, Ex. 647, 5th ed.; 4 Burn's Ecc. Law, 301, 7th edit.

(*o*) *Amos on Fixtures*, 138—150; *Toller*, Ex. 198; 1 Williams, Ex. ubi sup.; and see *Elliott v. Bishop*, 10 Exch. 496.

the person in remainder, though in general the former is bound to commit no *waste*, and to keep the inheritance entire and unimpaired; yet it would seem that trade and ornamental or domestic fixtures, if put up by himself, may also be lawfully removed by him, or by his personal representative, as the case may be; and that either during the continuance of his estate, or on its determination (*p*).

Again, as between landlord and tenant, it is held that the latter though guilty in general of waste, if he despoils the freehold, may nevertheless take away during the continuance of his term—or at the end of it, but not after he has quitted the premises (*q*)—such fixtures as he has himself put up, either for the purposes of trade, or for the ornament or furniture of the premises demised (*r*). But this right does not extend to erections of such a nature, that their removal would be of material detriment to the freehold; for these fall under the general rule, and not under the exception, and must consequently be yielded up to the landlord, at the end of the term, as parcel of the inheritance (*s*). Nor did this right, at common law, extend to things annexed to the realty for purposes merely *agricultural*. It is now enacted, however, by 14 & 15 Vict. c. 25, s. 3, that if a tenant of a farm or lands shall (with consent in writing of the landlord for the time being), at his own expense, erect any buildings or machinery, either for agricultural purposes or for the purposes of trade and agriculture (having been under no previous obligation to do so), such erection shall be the property of and remov-

(*p*) 1 Williams, Ex. 647, 5th ed. As to *trade* fixtures in reference to the respective rights of mortgagor and mortgagee, see *Climie v. Wood*, Law Rep., 3 Ex. 257; 4 Exch. 328; *Longbottom v. Berry*, ib., 5 Q. B. 123.

(*q*) See *Penton v. Robart*, 2 East, 88; *Lyde v. Russell*, 1 Barn. &

Adol. 394; *Heap v. Barton*, 12 C. B. 274; *Leader v. Homewood*, 5 C. B. (N. S.) 546.

(*r*) See *Grymes v. Bowden*, 6 Bing. 437; *Wilde v. Waters*, 16 C. B. 687; *Elliott v. Bishop*, 11 Exch. 113.

(*s*) *Buckland v. Butterfield*, 2 Brod. & Bing. 54.



able by the tenant, though permanently fixed to the soil, —provided that in removing them he do not injure the land or building, or at all events do put the same into as good plight and condition as they were before the erection was made; and provided he gives the landlord one month's notice of the intention to remove the erection; and that the landlord does not elect to purchase the same at a value to be ascertained by two referees or an umpire.

In all cases, however, it is material to remark, that the legal right of the tenant to remove fixtures is capable of being controlled or modified by the previous disposition or stipulation of the parties: a circumstance that, as between landlord and tenant more particularly, is of frequent occurrence; it being very usual for tenants to covenant that they will remove none of the fixtures that shall be annexed during the term to the demised premises, but will deliver them up, at its expiration, to the landlord's use. It is also worth notice, that the question of property in fixtures has been held liable to modification by the effect of a special usage, if any such can be shown to have long prevailed in the particular neighbourhood (*t*).

Besides these exceptions from the general rule of law that identifies fixtures with the freehold, they are liable, moreover, when in possession of a tenant for years, who is entitled to remove them, to be seised under a writ of execution against his goods and chattels (*u*); but when in possession of the tenant of the freehold, they are exempt from the operation of any such process (*x*); and fixtures are in no case subject to a distress for rent (*y*).

(*t*) 1 Williams, Ex. 647, 5th edit.; Davis v. Jones, 2 Barn. & Ald. 165.

(*u*) Poole's case, Salk. 368.

(*x*) Gilb. Execution, 19; Winn v. Ingilby, 5 Barn. & Ald. 625.

(*y*) Co. Litt. 47 b; Gorton v. Falkner, 4 T. R. 565. The question, whether fixtures can be seized as goods and chattels, sometimes

arises in reference to the provisions of the bankrupt law. On this subject see *Boydell v. M'Michael*, 3 Tyrw. 974; Ex parte King, 1 Mont. D. & D. 119; Ex parte Heatheote, 2 Mont. D. & D. 711; *Fletcher v. Manning*, 1 Car. & K. 350; *Wahmsley v. Milne*, 7 C. B. (N. S.) 115.

3. *Shares in public undertakings connected with land*;—The property in public undertakings of this description—such as mines, canals, and railroads to which the public are subscribers, and which are vested in them as a body corporate by charter or act of parliament,—is in the nature of realty, so far as regards the land itself, or the right of using it; and is, for some purposes, of the same nature as regards the fixtures connected with the concern (*z*). But the shares of the individual corporators in it, that is, the rights which each individual possesses as a partner in the surplus profit derived from the employment of the capital, are in the nature of personalty (*a*).

Things personal which partake of the qualities of things real consist—

1. Of certain kinds of chattels ranked as parcel of the freehold, by the *general law* of the realm, because necessary to the well-being of the inheritance (*b*). Of these we have already noticed one species, namely, animals *feræ naturæ* (*c*); for these, when confined upon a man's estate but not domesticated, fall, upon the death of the terretenant, under the same law of succession with the land itself,—so as to pass, if he were seised of an estate of inheritance, to his heir or devisee; if possessed for a term of years, to his executor or administrator (*d*). But it is to

(*z*) See *Comyn v. Kynets*, Cro. Jac. 150; *Stoughton v. Leigh*, 1 Taunt. 402; *R. v. Palmer*, 1 Barn. & Cress. 549; *R. v. Mayor of Bath*, 14 East, 609; *R. v. Lord Granville*, 9 Barn. & Cress. 188; *Minshall v. Lloyd*, 2 Mee. & W. 450.

(*a*) See *Phillips v. Phillips*, 1 Myl. & K. 649; *Bligh v. Brent*, 2 Y. & Col. 268; *Bradley v. Holdsworth*, 3 Mee. & W. 422; *Humble v. Mitchell*, 11 Ad. & El. 205. The shares in companies constituted under the

Companies Act, 1862 (25 & 26 Vict. c. 89), are by its express provision (sect. 22) "personal estate," and not in the nature of "real" estate. The Joint Stock Companies Act, 19 & 20 Vict. c. 47, contained a similar provision (sect. 15).

(*b*) 2 Bl. Com. 427.

(*c*) Vide sup. p. 6.

(*d*) Co. Litt. 8 a; Off. Ex. 53; Toller's Exec. 192, 2nd edit.; Lifford's case, 11 Rep. 50; *Morgan v. Abergavenny*, 6 C. B. 768.

be understood that animals *feræ naturæ*, if domesticated, become goods and chattels equally with animals naturally tame; and belong in every instance, on the death of the owner, to his personal representative (*e*). Again; charters and deeds, court rolls and other evidences of the land, together with the chests in which they are contained, pass together with the land to the heir (or devisee), and go not to the executor (*f*): though, where they have been deposited by the owner as a security for money lent, they are chattels in the hands of the pawnee, and his special property in them will pass on his decease to his personal representative (*g*). Moreover, the coat armour of a man's ancestor, hung up in a church with the pennons and other ensigns of honour suited to his degree, descend with the inheritance (*h*). And the case is the same with regard to a monument or tombstone—for though these are fixed to the realty, they are fixtures of a peculiar kind, and, contrary to the common rule, do not combine with the subject real to which they are attached, that is, the freehold of the parson; for to him the insignia in question can in no sense accrue. And accordingly it is laid down, that in this case albeit the chattels in question are annexed to that freehold, yet neither the parson or the personal representative of the ancestor can take them away, or deface them, but is liable to an action from the heir or devisee (*i*).

2. *Heir-looms*, which are such personal chattels as by the *special custom* of a particular place, go to the heir (or devisee), along with the inheritance of the messuage or land with the occupation of which they are connected:—

(*e*) Off. Ex. 57.

(*f*) 2 Bl. Com. 428, cites Bro. Ab. tit. Chattels, 18; and see Co. Lit. 6 a; Com. Dig. Biens, B., Charters A. Blackstone adds here (*ubi sup.*), that they pass in the nature of heir-looms; but heir-looms, as we

shall presently see, depend on local custom.

(*g*) Shep. Touch. 469.

(*h*) Bl. Com. *ubi sup.*; Spooner *v.* Brewster, 3 Bing. 136.

(*i*) 2 Bl. Com. 429, cites 12 Rep. 105; and Co. Litt. 18 b.

the termination *loom* being of Saxon original, in which language it signifies a limb or member, so that an heir-loom is nothing else but a limb or member of the inheritance (*k*). Under this denomination, carriages, pictures, utensils, and other household implements, may be included (*l*); but the custom of the particular place, by which they are liable to be so ranked, requires to be strictly proved (*m*);—the general law being, that no chattels personal whatsoever (other than those of which mention has been already made) shall descend on the heir, but shall vest in the personal representatives of the owner (*n*). These heir-looms, though mere chattels, yet cannot be separated from the inheritance *by will*; and a bequest of them, even by a tenant in fee simple, is simply void. For though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased, yet they being at his death, unless the devise has extended to the inheritance, instantly vested in the heir by the custom, the devise of them, (which is subsequent, and not to take effect till after his death,) shall be postponed to the custom whereby they have already descended (*o*).

The term “heir-looms” is often applied in practice to the case where certain chattels,—for example, pictures, plate, furniture and the like,—are directed by will or

(*k*) 2 Bl. Com. 427; Co. Litt. 18 b; Termes de la Ley; Spelm. Gloss. 277. It is said in 14 Vin. Ab. 291, that heir-looms are such things as have continually gone with the capital messuage, by *special custom*.

(*l*) See Corven’s case, 12 Rep. 105; Francis v. Ley, Cro. Jac. 366.

(*m*) 2 Bl. Com. 428; Co. Litt. 18, 185. The antient jewels of the crown are also said to be heir-looms (Co. Litt. 18); but as this does not de-

pend on local custom, they would seem more properly to rank as chattels which are parcel of the freehold by the *general* law of the realm.

(*n*) Co. Litt. 388.

(*o*) Co. Litt. 185 b. The law, as here laid down on the authority of Lord Coke and Blackstone, is supported by many other authorities, though it has been questioned in Woodd. Vin. Lect. vol. ii. p. 380.

settlement to follow the limitations thereby made, of some family mansion or estate. But the word is not here employed in its strict and proper sense, nor is the disposition itself, beyond a certain point, effectual; for the articles will in such case belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them, supposing them to be real estate; and if he dies intestate, will pass to his personal representative, and not to his heir (*p*).

(*p*) *Gower v. Grosvenor*, Barnard. Ch. Rep. 54; Co. Litt. by Harg. 18 b, n. (7). See *D'Eyncourt v. Gregory*, Law Rep., 3 Eq. Ca. 382; *Shelley v. Shelley*, ib., 6 Eq. Ca. 540; *Harrington v. Harrington*, ib. 3 Ch. App. 564.

BOOK III.

OF RIGHTS IN PRIVATE RELATIONS.

CHAPTER I.

OF MASTER AND SERVANT.

HAVING thus commented on the rights of persons individually considered, the method marked out now leads us to consider the rights of persons in their private relations (*a*).

[The three great relations in private life are:—First, That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. Secondly, That of *husband and wife*; which is founded in nature, but modified by civil society; the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. Thirdly, That of *parent and child*, which is consequential to that of marriage, being its principal end and design. But since the children require, during their infancy, to be protected and educated; and that not only in the lifetime of their parents, but after their death, in case of their being snatched away before their duty is performed, therefore the law has provided a

(*a*) Vide sup. vol. I. p. 136.

[fourth relation, which is that of *guardian and ward*. Of all these in their order.

In discussing the relation of *master and servant*, we shall first consider the several sorts of servants, and how this relation is created and destroyed; secondly, the effect of this relation with regard to the parties themselves: and, lastly, its effects with regard to other persons.

I. As to the several sorts of servants:—It is known to every reader, that slavery, or, in other words, that civil relation in which one man possesses absolute power over the life, liberty, and fortune of another, does not and cannot subsist in England (*b*). Indeed, our law abhors, and will not endure the existence of, slavery within this nation; so that when an attempt was made to introduce it, by statute 1 Edw. VI. c. 3, which ordained, that all idle vagabonds should be made slaves, and fed upon bread and water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues. And therefore this statute was repealed in two years afterwards (*c*). And in modern times, it has been laid down that a negro or other slave, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person and his property (*d*).] And we may notice here, that though in our West Indian Colonies a most galling

(*b*) In 1 Bl. Com. p. 423, it is remarked that the state of slavery (wherever subsisting) is in truth “altogether repugnant to reason” and the principles of natural “law;” and the three fold origin of the assumed right, as given by Justinian in the Institutes, (1, 3, 4,) “*Servi aut fiunt aut nascuntur;*

“*fiunt jure gentium, aut jure civili: nascuntur ex ancillis nostris,*”—is shown to be built on false foundations.

(*c*) By stat. 3 & 4 Edw. 6, c. 16.

(*d*) *Smith v. Browne*, Salk. 666; *Somersett's case*, 11 St. Tr. 340; Lofft. 1.

system of slavery was long suffered to prevail, that reproach to our humanity has been now wholly removed, as we had occasion to explain in a former volume (*e*). But while the English law thus absolutely rejects the relation of slavery, it sanctions and upholds the mere obligation of service,—the engagement, that is, of a man who is *sui juris*, and free to contract, to enter for pay, or other valuable consideration, into the service of another, and devote to him his personal labour, for such period as may be mutually agreed upon; for liberty is not here so far compromised, as to make life degrading or intolerable. The transaction is only a fair exchange of one advantage for another; and though it places men in a kind of subjection to his fellow creature, this is but the result of that natural inequality of gifts, fortunes and capacities, which it has pleased Providence to establish universally.

The first sort of servants, therefore, acknowledged by the laws of England are *menial servants*; so called from being *intra mœnia*, or domestics (*f*). The contract between them and their masters arises upon the hiring; and it is usual to engage them at a fixed amount of wages by the year. But there is generally no express stipulation as to the time that the service is to last; and then the hiring is thus understood,—that it is by the year, but that either party may determine it at pleasure, upon a month's notice, for which a month's wages (on the part of the master at least) are considered as an equivalent (*g*). A person who serves in an office of business, or engaged as a tutor or a governess, though employed in some sense *intra mœnia*, is nevertheless not a menial within the sense of our present remarks. If hired without express

(*e*) Vide sup. vol. i. pp. 108, 109.

(*f*) See *Nowlan v. Ablett*, 2 C., M. & R. 54.

(*g*) See *Gordon v. Potter*, 1 F. & F. 644. As to the effect of a domestic servant leaving *without no-*

tice, or being *dismissed for misconduct*, see Baylis on Domestic Servants, p. 5; Smith on the Law of Master and Servant, p. 74 (3rd ed.); Addison on Contracts, p. 366 (6th ed.)

agreement as to time, such person cannot be turned off at a month's notice like a common domestic, and is generally understood to be engaged by the year (*h*); though it has been held that there is no inflexible rule to that effect, but that each case must depend on its own circumstances (*i*).

A second species of servants are *labourers* who are employed in husbandry, and *workmen* engaged in trades or manufactures. And the justices of the peace have the power of compelling persons without any visible livelihood to go out to labour in husbandry, or in certain specific trades for the promotion of honest industry. The justices have also in a variety of cases jurisdiction to determine complaints between such servants as these and their employers; and to arrange by arbitration, under their direction, such differences between them as will admit of that mode of settlement (*k*). And the legislature has also now authorized the establishment of *equitable councils* of arbitration or conciliation between masters and workmen (*l*). The provisions of some of the earlier statutes regulating the legal relation of master and servant were chiefly framed for the protection of the *master*, but this is not the case now; for it being fitting that this inequality should be

(*h*) See *Beeston v. Collyer*, 4 Bing. 309; *Fawcett v. Cash*, 5 Barn. & Adol. 901; *Smith v. Hayward*, 7 Ad. & Ell. 544; *Goodman v. Pocock*, 15 Q. B. 576; *Todd v. Kerrich*, 8 Exch. 151; *Brown v. Symons*, 8 C. B. (N. S.) 208.

(*i*) *Fairman v. Oakford*, 5 H. & N. 635.

(*k*) See 5 Eliz. c. 4; 1 Ann. st. 2, c. 18; 9 Ann. c. 30; 13 Geo. 2, c. 8; 20 Geo. 2, c. 19, c. 27; 27 Geo. 2, c. 6; 31 Geo. 2, c. 11; 6 Geo. 3, c. 25; 17 Geo. 3, c. 56; 39 & 40 Geo. 3, c. 77; 53 Geo. 3, c. 40; 58 Geo. 3, c. 51; 1 Geo. 4, c. 93; 4 Geo. 4, c. 34; 5 Geo. 4, cc. 95, 96; 10 Geo. 4, c. 52; 1 & 2 Will. 4, c. 37; 7 Will. 4 & 1 Vict. c. 67; 6 &

7 Vict. c. 40; 8 & 9 Vict. c. 77, c. 128; 18 & 19 Vict. c. 108, s. 11; 19 & 20 Vict. c. 46; 30 & 31 Vict. c. 105, c. 130; 35 & 36 Vict. c. 46. The following cases, arising on one or other of the above enactments, may be consulted with advantage:—*R. v. Hulcott*, 6 T. R. 583; *Lancaster v. Greaves*, 9 Barn. & Cress. 628; *Wiles v. Cooper*, 3 Ad. & El. 524; *Lilley v. Elwin*, 11 Q. B. 742; *Geswood's case*, 2 Ell. & Bl. 952; *Bailey's case*, 3 Ell. & Bl. 607; *Queen v. Edward Bedwell*, 4 Ell. & Bl. 213; *In re Baker*, 2 H. & N. 219.

(*l*) 30 & 31 Vict. c. 105. But this Act does not extend either to *domestic* servants or to those employed in husbandry (sect. 17).

redressed, it was accordingly enacted by 30 & 31 Vict. c. 141, (continued by 36 & 37 Vict. c. 75,) that wherever either an employer or one employed shall neglect or refuse to fulfil any contract of service; or any question, difference or dispute shall arise as to the rights or liabilities of either of the parties, or touching any misuse, misdemeanor, misconduct, ill-treatment or injury to the person or property of either; the party aggrieved may complain to a justice of the peace, who may make such order as to wages or the fulfilment of the contract as the circumstances of the case may require; and in case the injury or ill-treatment has been of an aggravated character, and not committed in the *bonâ fide* exercise of a supposed legal right, and be such as cannot be met by a pecuniary compensation, may commit the offender to gaol for any term not exceeding three months, with or without hard labour (*m*)

Another species of servants are called *apprentices*, from *apprendre*, to learn; and these are bound by indenture usually for a term of years, to serve their masters, who on their part agree to maintain and instruct them during such period (*n*). This binding is generally to persons of trade, in order to learn their art and mystery. And by a provision of the 5 Eliz. c. 4, which remained in force until modern times, it was in general required, that every person exercising a trade in England should have previously served as apprentice to it for seven years (*o*). But by 54 Geo. III. c. 96, and 5 & 6 Will. IV. c. 76, all enactments, customs and bye-laws which had the effect of prohibiting trades and occupations to persons who had not served as apprentices, were abolished. It is, however, to

(*m*) This statute (as to the construction of which, see *Crane v. Powell*, Law Rep., 4 C. P. 123) has, however, no application to the case of *domestic* servants or servants *in husbandry*. It may be observed here that the circumstances may be such as to bring the case within the pro-

visions as to *molestation* contained in the Criminal Law Amendment Act, 1872, or the law of conspiracy, (vide post, bk. VI. ch. IX., ch. XI.)

(*n*) 1 Bl. Com. 426. As to the construction of indentures, see *Phillips v. Clift*, 4 II. & N. 168.

(*o*) 11 Rep. 54; 1 Bl. Com. 427.

be observed that neither of these statutes apply to the city of London, the customs and bye-laws whereof on this subject remain consequently as before. Apprentices are usually bound out by their friends; though their own consent (testified by their executing the indentures) is essential to the validity of the transaction (*p*). But there is a class called *parish* apprentices, who are bound out under different conditions (*q*). For the children of parents unable to maintain them, may be apprenticed till the age of twenty-one to such persons as shall be thought fitting by the guardians or overseers of the parish without their own consent or becoming parties to the indentures (*r*); and the persons selected as their masters, were formerly also compellable to take them (*s*). But by 7 & 8 Vict. c. 101, s. 13, the reception of a parish apprentice is made no longer compulsory. A variety of statutes regulate the manner in which parish apprentices are to be bound, assigned, registered and maintained: a subject which is besides now placed under the paramount control of the Local Government Board; who have power to introduce new rules, from time to time, as they may think fit (*t*). And there are also numerous enactments by which justices of the peace are empowered to settle disputes between apprentices (whether bound by the parish or not) and their masters;

(*p*) *R. v. Arnesby*, 3 Barn. & Ald. 584.

(*q*) 7 & 8 Vict. c. 101, s. 12.

(*r*) If the parish forms part of a union, or is subject to a board of guardians, the binding is by the guardians (7 & 8 Vict. c. 101, s. 12); elsewhere by the *overseers*, in which case the sanction of two justices must be obtained. (See the *Queen v. The Inhabitants of St. George's Bloomsbury*, 4 Ell. & Bl. 520.)

(*s*) Salk. 67, 491.

(*t*) See 43 Eliz. c. 2, s. 5; 8 & 9 Will. 3, c. 30; 18 Geo. 3, c. 47; 56

Geo. 3, c. 139; 42 Geo. 3, c. 46; 7 & 8 Vict. c. 101, ss. 12, 13. And as to binding parish apprentices to the trade of *chimney sweeping*, see 4 & 5 Will. 4, c. 35; and the *Queen v. Inhabitants of Epsom*, 4 Ell. & Bl. 1003. As to binding them to the *sea service*, see 17 & 18 Vict. c. 104, ss. 141—145. As to *inspecting* them periodically, see 14 & 15 Vict. c. 11. By this last Act, moreover, *all persons under the age of sixteen hired from a workhouse*, are required to be registered and periodically visited.

and to discharge apprentices from their indentures upon reasonable cause shown (*u*).

It is further to be observed, that besides servants in the ordinary sense of the term, factors, brokers, and other persons employed for special or temporary purposes, are technically described as servants, so far as the particular employment is concerned; though many of these more commonly pass by the general denomination of *agents*. The discussion of the law relative to servants of this description does not, however, belong to the present occasion; and it has already found its place in that part of the work which treats of the law of principal and agent (*x*). It shall here only be observed, that many of the principles which apply to ordinary servants, apply also to these particular and temporary agents, and *vice versâ*.

We now proceed to the consideration,

II. Of the manner in which the relation of service affects either the master or the servant.

A domestic servant, in the absence of special agreement to the contrary, is entitled to be properly fed and lodged by his employer; and if he should become disabled, by sickness or other accident, for the performance of his duties, this does not justify the master in discharging him without such notice or wages as he might otherwise claim (*y*). And by 24 & 25 Vict. c. 100, s. 26, it has been provided, that where the master or mistress of any apprentice or servant shall be legally liable to provide for him necessary food, clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect so to do; or shall unlawfully and maliciously do any bodily harm to him, so that

(*u*) See 5 Eliz. c. 4, s. 35; 61; 5 & 6 Vict. c. 7; and 30 & 31
20 Geo. 2, c. 19; 31 Geo. 2, c. 2; Vict. c. 141.

6 Geo. 3, c. 25; 32 Geo. 3, c. 57; (*x*) Vide sup. p. 65.

33 Geo. 3, c. 55; 54 Geo. 3, c. 96; (*y*) Dalt. Just. c. 58, p. 141, edit.
56 Geo. 3, c. 139; 4 Geo. 4, cc. 29 1742.

and 34; 4 & 5 Will. 4, c. 76, ss. 15,

his life shall be endangered, or health permanently injured or likely to be so;—such master or mistress shall be guilty of a misdemeanor, punishable with penal servitude for five years; or by imprisonment for a term not exceeding two years, with or without hard labour (*z*). On the other hand it is to be observed, that a master, as a general rule, is not legally bound to provide his domestic servant (not being his apprentice) either with medicine or with medical attendance; for, if he be unable to provide such for himself, he has, like other paupers, a right to relief from the public, under the poor-laws (*a*). Nor is the master, in general, liable to his servant (domestic or otherwise) for an injury which is the result of the negligence of a fellow-servant (*b*). If a servant be guilty of moral misconduct, or of wilful disobedience, or habitual neglect of his master's lawful commands, the master is in such case entitled to dismiss him without warning (*c*); and he can claim no wages that had not actually fallen due before the dismissal (*d*). Again, if a servant steals or embezzles his master's goods, it is a felony of an aggravated kind (*e*). But on the other hand he is not liable for the goods of his

(*z*) See 27 & 28 Vict. c. 47. It is to be noticed that the provisions of 24 & 25 Vict. c. 100, s. 26, are not affected by the 30 & 31 Vict. c. 141, mentioned *supra*, p. 231. See sect. 18 of the Act last named.

(*a*) *Wennell v. Adney*, 3 Bos. & Pul. 247. *Secus* as to an *apprentice*. (See per Patteson, J., *R. v. Smith*, 8 Car. & P. 153.)

(*b*) This proposition of law (which was first established in the case of *Priestley v. Fowler*, 3 Mee. & W. 1), has been since amply illustrated. The following recent cases may be consulted, *Searle v. Lindsay*, 11 C. B., N. S. 429; *Potter v. Faulkner*, 1 B. & Smith, 800; *Gallagher v. Piper*, 16 C. B., N. S. 669; *Tunney*

v. Midland Railway Company, Law Rep., 1 C. P. 291; *Feltham v. England*, *ib.*, 2 Q. B. 33.

(*c*) According to the books a master may even correct his servant (being his apprentice), so it be done with moderation (see *Gylbert v. Fletcher*, Cro. Car. 179; *Winstone v. Linn*, 1 Barn. & Cress. 469; *Edward v. Trevellick*, 4 Ell. & Bl. 67); but “if the master, or the master's wife, beat any other servant of full age, it is good cause of departure.” (1 Bl. Com. 428.)

(*d*) See *Turner v. Robinson*, 5 Barn. & Adol. 789; *Baillie v. Kell*, 4 Bing. N. C. 638; *Lomax v. Arding*, 10 Exch. 734.

(*e*) *Vide post*, bk. VI. pt. II. c. v.

master taken out of his possession by robbery, provided his own conduct has been free from blame (*f*).

If, in order to procure a hiring as a servant, any of those frauds are resorted to, which are commonly known under the description of obtaining or giving a false character, a penalty of 20*l.* is incurred under the 32 Geo. III. c. 56, by all persons concerned therein, or in default, imprisonment with hard labour (*g*). And it may lastly be noticed that when a servant quits his place, the master is not obliged, in point of law, to give him a character (*h*); though if from malicious motive he gives a false character, imputing a fault which does not really exist, he is liable to an action at the suit of the party so injured (*i*). Malice, however, is an essential ingredient in this cause of action. For no action will lie upon a representation *bonâ fide* made; even though it was false in fact, and injurious to the character of the servant (*k*).

III. [Let us now see how strangers may be affected by this relation of master and servant: that is to say how a master may behave towards others, on behalf of his servant; and what a servant may do on behalf of his master.

And, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger; whereas, in general, it is an offence against public justice, to encourage suits and animosities by helping to bear the expense of them; and is called, in law, maintenance (*l*). A master also may bring an action against any man for beating or maiming his servant; but in such case he must assign, as a special reason for so doing, his own damage

(*f*) 4 Rep. 84 a; Nickson *v.* Broban, 10 Mod. 109.

(*g*) Vide post, bk. vi. c. xii.

(*h*) Carrol *v.* Bird, 3 Esp. 201.

(*i*) See Fountain *v.* Boodle, 3 Q. B. 5.

(*k*) See Pattison *v.* Jones, 8 Barn. & Cress. 578; Child *v.* Affleck, 9

Barn. & Cress. 403; Kelly *v.* Partington, 4 Barn. & Adol. 700; Gardiner *v.* Slade, 13 Q. B. 796; Taylor *v.* Hawkins, 16 Q. B. 308; Somerville *v.* Hawkins, 10 C. B. 583.

(*l*) 2 Roll. Ab. 115; vide post, bk. vi. c. ix.

[by the loss of the service; and this loss must be proved upon the trial (*m*). A master, likewise, may justify an assault in defence of his servant, and a servant in defence of his master (*n*): the master, because he has an interest in his servant, not to be deprived of his service; the servant because it is part of his duty, for which he receives his wages, to stand by and defend his master (*o*). Also if any person do cause or procure my servant to leave me, or do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know that he is my servant, no action lies against him; unless indeed he afterwards refuses to restore my servant upon information and demand (*p*). The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics, acquired by the contract of hiring, and purchased by giving them wages.

As for those things which a servant may do on behalf of his master, this general principle may be laid down; that the master is answerable in all cases for the act of his servant, if done by his command or authority, either expressly given or implied: for, *qui facit per alium, facit per se* (*q*). In this respect the law makes no distinction

(*m*) 9 Rep. 113; Cock *v.* Wortham, 1 Selw. N. P. 999; Hall *v.* Hollander, 4 Barn. & Cress. 660.

(*n*) 2 Roll. Ab. 546; 1 Hawk. b. i. c. 60, ss. 23, 24; Tickell *v.* Read, Lofft, 215; see Ditcham *v.* Bond, 2 Mau. & Sel. 436; Hodsoll *v.* Stallebrass, 11 A. & E. 301.

(*o*) In like manner, by the laws of King Alfred, (c. 38,) a servant was allowed to fight for his master, a parent for his child, and a husband or father for the chastity of his wife or daughter.

(*p*) F. N. B. 167, 168; Blake *v.* Lanyon, 6 T. R. 221. As to this action, see also Lumley *v.* Gye, 2 Ell. & Bl. 216.

(*q*) 4 Inst. 109. See the following among other cases illustrative of this doctrine:—Quarnam *v.* Burnett, 6 Mee. & W. 509; Rapson *v.* Cnbitt, 9 Mee. & W. 713; Milligan *v.* Wedge, 12 Ad. & Ell. 737; Burgess *v.* Gray, 1 C. B. 578. As to the application of the general doctrine on this subject to the case of *sub-contractors*, see Overton *v.* Freeman, 11

[between ordinary servants, and those who are more properly and usually termed *agents*; to whom, as we have seen in a former place, the same principle applies (*r*). But the illustrations of it which occur in the case of an ordinary servant, seem, nevertheless, to deserve a separate notice.

According to this principle, then, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it; though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. So it is laid down that if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master(*s*); for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command. Upon the same principle, too, if a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master. But in these cases the damage must be done while he is actually employed in the master's service; otherwise the master is not liable (*t*). It was accordingly held at the common law, that if a servant kept his master's fire *negligently*, so that his neighbour's house was burned down thereby, an action lay against the master, because this negligence happened in his service: otherwise, if the servant going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service (*u*). And

C. B. 867; *Sadler v. Henlock*, 4 Ell. & Bl. 570. As to its application to *railway companies* and their servants, see *Cox v. Midland Railway Company*, 3 Exch. 268; *Reedie v. London and North Western Railway Company*, 4 Exch. 244.

(*r*) Vide sup. p. 65.

(*s*) Roll. Abr. 95.

(*t*) See *Randleson v. Murray*, 8 Ad. & El. 109; *Lygo v. Newbold*, 9 Exch. 302; *Patten v. Rac*, 2 C. B. (N. S.) 606. *Seymour v. Greenwood*, 6 H. & N. 359; 7 H. & N. 355. *The Queen v. Stephens*, Law Rep., 1 Q. B. 702; *Storey v. Ashton*, ib., 4 Q. B. 476.

(*u*) *Noy's Max.* c. 44.

[such is still the law; but if my neighbour's house is burnt down by reason of a fire *accidentally* and without negligence arising in my house, he is declared by 14 Geo. III. c. 78, s. 86, to be incapable of maintaining any action against me (*x*). A master is, lastly, chargeable if any of his family layeth or casteth anything out of his house into the street or common highway, to the damage of any individual or the common nuisance of his majesty's liege people: for the master hath the superintendence and charge of all his household (*y*). And this also agrees with the civil law; which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi*" (*z*).

On the other hand, however, the master is not bound by what the servant does *without* his authority, express or implied: even though it may be done in the course of, or in relation to, the service (*a*). Thus, if I pay money to a gentleman's servant who is not usually employed to receive money for his master, and he embezzle it, I must pay it over again. So if I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust if he purloin it, so that it comes not to my use; for here is no implied order to the tradesman to trust my servant. But if I usually send my servant upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority (*b*).] Upon the same ground, the master

(*x*) 1 Bl. Com. 431. See Filliter *v.* Phippard, 11 Q. B. 347, where the passage from Blackstone (which has been corrected in the text) is shown to be inaccurate.

(*y*) Noy's Max. c. 44.

(*z*) Ff. 9, 3, 1; Inst. 4, 5, 1.

(*a*) See McManus *v.* Crickett, 1 East, 106; Croft *v.* Alison, 4 Barn. & Ald. 590; Lyons *v.* Martin, 8 Ad.

& El. 512; Grant *v.* Norway, 10 C. B. 665; Coleman *v.* Riches, 16 C. B. 104; Udell *v.* Atherton, 7 H. & N. 172; Limpus *v.* London Omnibus Company, 1 Hurl. & Colt. 526.

(*a*) Dr. & Stud. d. 2, c. 42; Noy's Max. c. 44; and see Nickson *v.* Brohan, 10 Mod. 111; Hiscox *v.* Greenwood, 4 Esp. 174; Rusby *v.* Scarlett, 5 Esp. 76.

is not liable for a crime of wilful injury,—such as an assault,—committed by the servant without his command or encouragement; even though it may be in the course of, or in relation to, the service (*c*).

While the master is thus, in the cases above mentioned, liable for the acts of his servant, the latter is, in many instances, not himself personally liable for what he does in that capacity. For, with respect to his purchases from tradesmen for his master's use, if he be known by the person with whom he deals to be acting merely as a servant, and if his authority to purchase be sufficient, he cannot himself be charged for the price of the goods. Nor can a servant to whom his master has entrusted a sum of money, for the purpose of his paying it over to a third party, be sued by that party for the money, in the event of its remaining unpaid (*d*). And so a servant cannot be sued for an act of negligence committed in the course of his service, by one whose dealing was with his master. Thus when a parcel was mislaid by a stage coachman, the owner of the coach was held liable to the sender, but not the coachman himself (*e*). For all crimes, however, which a man commits he is criminally responsible,—and for all wilful or other injuries of a private character, is generally liable to an action for damages,—whether he did the act by the authority of another or not (*f*).

(*c*) See *McManus v. Crickett*, 1 East, 106; *Gordon v. Rolt*, 4 Exch. 365; *Peachey v. Rowland*, 13 C. B. 182; *The Queen v. Stephens*, Law Rep., 1 Q. B. 702.

(*d*) *Howell v. Batt*, 2 Nev. & M. 381; see *Greenway v. Hurd*, 4 T. R. 553; *Coles v. Wright*, 4 Taunt. 198.

(*e*) *Williams v. Cranstoun*, 2 Stark. Rep. 82; *Cavenagh v. Such*, 1 Price, 328. And see 1 Roll. Ab. 94, 95.

(*f*) See *Stephens v. Elwall*, 4 Man. & Sel. 259; *Wilson v. Peto*, 6 Moore, 47.

CHAPTER II.

OF HUSBAND AND WIFE.

THE next relation to be treated of is that arising on marriage; which includes the reciprocal rights and duties of husband and wife; or, as most of our elder law books call them, *baron* and *feme*. And here it may be proper to premise, that as, in the Roman Catholic faith, marriage ranks as a sacrament of the Church, it naturally fell, during the period when that was the established religion of this country, under the cognizance of the Ecclesiastical Courts, so as to give them power of adjudication in various matters of a matrimonial description; and in particular with regard to divorce and alimony, subjects to which we shall presently recur (*a*). Nor did this state of things sustain any change at the period of the Reformation; notwithstanding which event, these courts

(*a*) The jurisdiction of the ecclesiastical courts in matters matrimonial, as stated in Blackstone (vol. iii. p. 94), included, in addition to divorce and alimony, 1. *Causa jactationis matrimonii*, when one of the parties falsely boasted or gave out that he or she was married to the other, whereby a common reputation of their matrimony might ensue; for which injury, the only remedy the court could afford, was to enjoin perpetual silence on that head (see Lord Hawke *v.* Corri, 2 Hagg. 220). 2. *The suit for restitution of conjugal rights*, which was brought

wherever the husband or wife was guilty of the injury of "subtraction" and lived separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction would compel them to come together again, if either party were weak enough to desire it, contrary to the inclination of the other. There was also, at one period, a suit *to compel the celebration of a marriage* in pursuance of a contract to that effect. But this was abolished by 26 Geo. 2, c. 33, and 4 Geo. 4, c. 76, s. 27.

continued to exercise the authority that had immemorially belonged to them in the matters here described; and this jurisdiction remained undisturbed until recently. But the same session of parliament, which deprived the spiritual courts of their power in causes testamentary, stripped them also of that which they had theretofore enjoyed in causes matrimonial (*b*). For, in the year 1860, by the statute 20 & 21 Vict. c. 85 (*c*), a new court was erected under the title of the “Court of Divorce and Matrimonial Causes,” to be held before the Lord Chancellor and the judges of the superior courts at Westminster, together with the judge of the Court of Probate,—which last judge, however, (of whom we have spoken in a previous chapter,) was also made judge *in ordinary* of the new Divorce Court; and, when thus sitting alone, was enabled to exercise in general the powers and authority of the full court (*d*). And as to this new court, it is material incidentally to remark, that, in addition to the jurisdiction over such matters matrimonial as formerly fell under the cognizance of the courts ecclesiastical, another jurisdiction of considerable importance was bestowed upon it after its establishment. For by 21 & 22 Vict. c. 93, it was enacted that persons might apply to it for a declaration of their legitimacy or of the validity of the marriages of their fathers and mothers, or of their grandfathers and grandmothers; or for a declaration of their own right to be deemed natural-born subjects.

In the consideration of the subject of marriage, we shall, in the first place, inquire how it may be contracted; secondly, take a view of its legal effect and consequences; and, lastly, treat of the manner of its dissolution.

(*b*) Vide sup. pp. 185, 192.

(*c*) This Act has been since amended by 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; and 31 & 32 Vict. c. 77.

(*d*) 20 & 21 Vict. c. 85, s. 9; 23

& 24 Vict. c. 144, s. 1. From the commencement of the Judicature Act, 1873, on 2nd Nov. 1874, this court becomes part of the High Court of Justice by that Act established (see 36 & 37 Vict. c. 66, ss. 3, 34).

I. First, then, as to the manner in which this relation is formed, it may be observed generally, that the law considers marriage in the light of a *contract*, and applies to it, with some exceptions, the ordinary principles which attach to other contracts: one of the chief of which is that every person is competent to contract unless he or she labours under some disability.

Now, as regards the contract of marriage, these disabilities are of two sorts: first, such as are canonical; secondly, such as are civil. *Canonical* disabilities, (so called from their having formerly fallen under the cognizance of the Ecclesiastical Courts,) make the marriage voidable by a judicial sentence, but not *ipso facto* void (*f*); of which class is a natural inability, at the time of the marriage, to procreate children (*g*). Of this nature, also, was the disability once recognized of a pre-contract or engagement to another person (*h*). But as to this, it was provided by 32 Hen. VIII. c. 38, that all marriages solemnized in the face of the Church shall be indissoluble, notwithstanding any pre-contract not consummated; and by the 26 Geo. II. c. 33 (re-enacted in the subsequent Marriage Act of 4 Geo. IV. c. 76), it was declared that no proceedings should be had in any Ecclesiastical Court to compel the celebration of a marriage in pursuance of a contract (*i*). As to any canonical disability, it is to be understood that it will not avail to avoid the marriage unless both an actual sentence to that effect be given, and it be given during the life of the parties; for our law will not allow the marriage to be called in question, in such cases, after the death of either of them (*j*).

(*f*) 1 Bl. Com. 434; 1 Roll. Ab. 357.

(*g*) Bl. ubi sup.; 1 Roll. Ab. 360; Bury's case, 5 Rep. 98; Morris v. Webber, Moor. 225; 2 Leon. 169; Dy. 179 a, pl. 40.

(*h*) Bl. ubi sup.

(*i*) This provision of 26 Geo. 2, c. 33, has been considered as reviving

and extending the Act of Hen. 8 (the branch of which relating to this subject was repealed by 2 & 3 Edw. 6, c. 23), so as wholly to abolish the impediment of pre-contract. (See 1 Bl. Com. 435; Bac. Ab. Marriage (E.); Co. Litt. by Harg. 79 b, n. (4).)

(*j*) The courts of common law would not suffer the *spiritual courts*

[As to *civil* disabilities, (or such as are recognized by the common law,) it may be laid down generally, that they make the contract void *ab initio*, and not merely voidable; not that they dissolve a contract already formed, but that they render the parties incapable of forming any contract at all; they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons, under these legal incapacities, come together, it is a meretricious and not a matrimonial union. It may further be observed, that the existence of a disability of this class may be determined in the ordinary courts of law, as, for example, in reference to a parochial settlement, or in a prosecution for bigamy.

1. The first of these legal disabilities is a prior marriage, and having another husband or wife living: in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void (*l*).

2. A second civil incapacity is want of reason; without a competent share of which, in the parties thereto, as no other, so neither can the matrimonial contract be valid (*m*). And by our law, it is accordingly established that the marriage of a lunatic, not being in a lucid interval, is absolutely void (*n*). And as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, the 15 Geo. II. c. 30, specifically provides that the marriage of a lunatic, found to be such under

(while they had jurisdiction) to declare, after the death of the parties, their marriage to be void on the ground of a canonical disability (1 Bl. Com. 434; Co. Litt. 33 a; Bury's case, 5 Rep. 98; 1 Roll. Ab. 367; Harris v. Hicks, Salk. 548); and it may be presumed therefore that the new Court for Divorce and Matrimonial Causes would refuse

to declare a marriage to be void under those circumstances.

(*l*) Bro. Ab. tit. Bastardy, pl. 8; Cro. Eliz. 858; 1 Salk. 121; R. v. Harborne, 2 Ad. & El. 540. As to the offence of bigamy, vide post, vol. IV. bk. VI. ch. XII.

(*m*) 1 Roll. Ab. 357.

(*n*) Morrison's case, coram Deleg. And see Hancock v. Peaty, Law Rep., 1 P. & D. 335.

[a commission, shall be totally void, unless he or she has been previously declared to have regained a sound mind by the Lord Chancellor (*n*).]

3. A third incapacity is in respect of proximity of relationship; that is, being within the prohibited degrees of consanguinity or affinity. By stat. 32 Hen. VIII. c. 38 (*o*), it is declared that every marriage contracted between lawful persons, to wit, such as “be not prohibited by God’s law to marry,” when solemnized in the face of the Church, and consummated with bodily knowledge or fruit of children, shall be good and indissoluble; and that no prohibition, “God’s law except” (*p*), shall impeach any marriage beyond the Levitical degrees (*q*). One object of this statute was to remove the vexatious impediments to marriage on the ground of kindred, which prevailed in the times of popery, though they might be bought off for money (*r*); and by its effect the only marriages which are now illegal in respect of proximity of degree (as being either contrary to God’s law or within the Levitical degrees), are the following, viz.,—those between persons in the ascending and descending line *in infinitum* (*s*),—and those between collaterals to the third degree inclusive,

(*n*) Blackstone (vol. i. p. 439), says that there were also “private family reasons” for the passing of this statute, and refers to 23 Geo. 2, c. vi.

(*o*) As to the history of this Act, see Hist. Eng. L. by Reeves, vol. iv. p. 220.

(*p*) As to these words, see Vaughan, 220, 305; 2 Inst. 687. They relate to the law of nature, which condemns commixtures in the direct line of descent *in infinitum*, though such marriages are not noticed among the express prohibitions in Leviticus.

(*q*) As to the Levitical degrees, see Levit. xviii., xx. In the statute

32 Hen. 8, c. 38, the prohibited degrees are not enumerated; but there is some specification of them in the 25 Hen. 8, c. 22, which was repealed by the 28 Hen. 8, c. 7. This last Act, which (by s. 7) again prohibited the same marriages, was itself repealed by 1 & 2 P. & M. c. 8. See Burn, Ecc. Law, tit. Marriage; Christ. Black. vol. i. p. 435; per Lord St. Leonards, (in the case of *Brook v. Brook*), 9 H. of L. Cas. 232.

(*r*) 1 Bl. Com. p. 435.

(*s*) See Vaughan, 232; Gibs. Cod. 413; Burn, tit. Marriage, I.; Extrav. de Consanguin. &c. Can. 8; Grot. de Jure Belli et Pacis, l. 2, c. 5, sect. 12.

according to the mode of computation in the civil law (*t*); which reckons the sum of the degrees from, (but exclusively of,) one of the persons related up to the common stock, and so down to the other person. It is, however, to be understood that the prohibitions in the case of collaterals extend not only to *consanguinei*, or those related by blood, but to *affines*, or those related by marriage. Thus a man can marry neither his sister nor his wife's sister (*u*), for both are related to him in the second degree; nor his sister's daughter, nor wife's sister's daughter (*x*), for both are in the third degree; but he may marry his first cousin, for she is in the fourth degree (*y*). The *consanguinei* of the wife, it may be remarked, are always related by affinity to the husband, and the *consanguinei* of the husband to the wife; but on the other hand, the *consanguinei* of the husband are not at all necessarily related to the *consanguinei* of the wife. Hence two brothers may marry two sisters, or father and son a mother and daughter (*z*). Nor is the husband related to the *affines* of the wife, nor *vice versâ*. Therefore a man may marry his wife's brother's wife (*a*). It is further to be observed, that the prohibitions as to collaterals extend to such as are related by the half blood only; and that they also apply, though one of the parties be a bastard. For notwithstanding this circumstance, which makes him *nullius filius* as to many

y. 2 1/2 p. 8

(*t*) Vaughan, 218. See *R. v. Chadwick*, 11 Q. B. 173. The prohibitions in Leviticus, in regard to collateral relationship, all apply to persons who, according to the computation of the civilians (vide sup. p. 194), would be within the third degree; and the prohibitions in the early Christian Church were exactly co-extensive. The computation of the canonists is different, it will be recollected, from that of the civilians (ib.).

(*u*) Vaughan, 302; see The

Queen v. Chadwick, 11 Q. B. 173; and *Brook v. Brook*, 9 H. of L. Cas. 193.

(*x*) Sir T. Raym. 464; Sir T. Jones, 191. See the case of the *Queen v. Brighton* (Inhabitants of), 1 B. & S. 447.

(*y*) See the Table of Degrees of Consanguinity, opposite to p. 194, sup.

(*z*) 1 Bl. Com. 435, n. by Christian.

(*a*) Ibid.

civil consequences, the law recognizes his relationship to his natural parent for moral purposes (*b*). The incapacity in respect of proximity of relationship was till lately a canonical only, and not a civil, disability (*c*). But by statute 5 & 6 Will. IV. c. 54, all marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely void to all purposes whatever—which brings the objection within the class of civil disabilities (*d*).

4. The last disability we shall notice is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting: *à fortiori*, therefore, it ought to avoid this, the most important contract of any (*e*). A male person is enabled by law to consent to matrimony at the age of fourteen, a female at the age of twelve (*f*), though (as hereafter explained) this is in some cases restricted by the authority entrusted by our law to the parent or guardian of an infant (*g*). But though the male be under fourteen, or the girl under twelve, the marriage is not absolutely void, but is inchoate only and imperfect (*h*); in which respect the present disability differs from the others of the civil class of which we have already treated; and either of the parties, upon coming to the proper age for his or her

(*b*) Bac. Ab., Marriage, A.

(*c*) Sir T. Raym. 464; see *R. v. Inhabitants of Wye*, 7 Ad. & El. 771.

(*d*) See *The Queen v. Chadwick*, 11 Q. B. 173, and *Brook v. Brook*, 9 H. of L. Ca. 193, in which last case the House of Lords decided that a man cannot contract a marriage with his wife's sister which shall be valid in this country and render the issue thereof legitimate, by having the ceremony performed in a country where such marriages are *not* prohibited by law. (See also *Howarth v. Mills*, Law Rep., 2 Eq.

Ca. 389.)

(*e*) 1 Bl. Com. 436.

(*f*) Co. Litt. 79 a; 1 Hale, P. C. 17.

(*g*) Vide post, pp. 248, 295.

(*h*) See Co. Litt. by Harg. 79 b, n. (1). It is said in Burn's Ecc. L. tit. Marriage, I., that if either party be under *seven*, it is a nullity; and that the civil and the canon law in this respect agree; and see Hist. Eng. Law, by Reeves, vol. iv. p. 53. It does not appear, however, that the common law makes any distinction of this kind. (See Co. Litt. 33 a.)

consent, may disagree and declare the marriage void (*i*). [In addition to which it is to be observed, that if the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she: and so it is *vice versâ*, when the wife was of years of discretion, and the husband below the age of consent (*j*). But if at the age of consent they agree to continue together, they need not be married again. The doctrine of disability in respect of age is founded, we may observe, on the Roman civil law (*k*). The canon law pays greater regard to the constitution than the age of the parties; holding that if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be (*l*).]

What is above stated on the subject of the age for matrimony, is to be understood of the actual marriage contract and ceremony, by which the parties become man and wife; for a promise to marry at a future time,—which, like other contracts, gives a right of action for damages in case of its violation (*m*),—is not binding on the party charged unless he or she be of the full age which the law provides for other cases of contract, viz. twenty-one (*n*). And where there are mutual promises to marry made by two persons, one of the age of twenty-one, and the other under that age, the first is bound by the contract, so as to be liable to an action if it be broken; but on the side of the minor it is voidable (*o*).

All persons, then, save those who labour under one or other of the disabilities we have mentioned, may contract

(*i*) Co. Litt. 79 a, 79 b; Bac. Ab. Infancy, A.

(*j*) Co. Litt. 79 a, 79 b; Bac. Ab. Infancy, A.; 1 Bl. Com. 436.

(*k*) Leon. Constit. 109.

(*l*) Decretal. l. 4, tit. 2, qu. 3.

(*m*) See Wild v. Harris, 7 C. B.

999, as to the consideration necessary to support this action.

(*n*) Co. Litt. by Harg. 79 b, n. (2).

(*o*) Holt v. Ward, Str. 937; Bruce v. Warwick, 6 Taunt. 118; Warwick v. Bruce, 2 Mau. & Sel. 305.

a marriage one with the other. In what manner this contract is to be solemnized, is a matter which formerly depended altogether upon the rules of the ecclesiastical law (*p*). And by that law it is required that there should not only be a mutual contract of espousal *per verba de presenti*, that is to say with words in the present tense, —but that it should be solemnized by a priest in holy orders; without which it is considered as no complete legal marriage (*q*). [But this last requisite is merely *juris positivi*, not *juris naturalis aut divini*; it being said that Pope Innocent the third was the first who ordained the celebration of marriage in the church; before which it was totally a civil contract (*r*).]

The manner, however, of contracting this relation, and the formalities proper to the celebration of marriage in this country according to the office of the Church, are now prescribed by the supreme authority of the legislature itself, though certain portions of the canon law on this subject are thereby preserved (*s*). The principal marriage Acts now in force, are 4 Geo. IV. c. 76, and 6 & 7 Will. IV. c. 85 (*t*); of which we shall here treat in their order of date, and (on account of the importance of the subject) with some degree of minuteness. First, then, the statute of 4 Geo. IV. prescribes, (in conformity with the canon law, as set forth in the Book of Common

(*p*) See Hist. Eng. L. by Reeves, vol. iv. pp. 52—65, where much information will be found as to the canonical jurisprudence on this subject.

(*q*) See *Haydon v. Gould*, 1 Salk. 119; *R. v. Luffington*, 1 Wils. 74.

(*r*) Moor. 770.

(*s*) It has been decided by the House of Lords, that, to constitute a valid marriage by the common law of England, it must be celebrated in the presence of a priest in holy orders. (*The Queen v.*

Millis, 10 Cl. & Fin. 534.) And that such priest must be other than one of the parties to the contemplated marriage. (*Beamish v. Beamish*, 9 H. of L. Cas. 274.)

(*t*) There were two previous Acts, viz., 26 Geo. 2, c. 33 (called Lord Hardwicke's Act), and 4 Geo. 4, c. 17, both of which are repealed by 4 Geo. 4, c. 76. The 6 & 7 Will. 4, c. 85, has been amended by 7 Will. 4 & 1 Vict. c. 22; 3 & 4 Vict. c. 72; and 19 & 20 Vict. c. 119.

Prayer,) the previous publication of *banns* upon three successive Sundays, in manner therein mentioned, in the church where the marriage is to be solemnized(*u*): or, in lieu thereof, a *licence* from the proper ecclesiastical authority, that the marriage shall be had without banns(*x*),—that is, a “special” licence from the Archbishop of Canterbury(*y*), or a “common” licence from the ordinary of the place or his surrogate(*z*). And all ministers in holy orders are forbidden to proceed to solemnize a marriage more than three months after the complete publication of the banns, or grant of the licence(*a*). The Act also requires that the marriage shall be in a church wherein banns may be lawfully published(*b*); and shall take place between the hours of eight and twelve in the forenoon (except in the case of special licence); and shall moreover be solemnized by a person in holy orders, and before not less than two credible witnesses besides(*c*). These are the principal regulations of this statute as to the ceremony; in addition to which, however, it directs generally, that the rules prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, and not

(*u*) 4 Geo. 4, c. 76, s. 2. As to *banns*, see Lyndw. 273, 274. As to the effect of a publication of banns in a wrong name, see *R. v. Billingham*, 3 Man. & Sel. 250; *R. v. St. Faith's*, Newton, 3 Dow. & Ry. 348; *R. v. Tibshelf*, 1 Barn. & Adol. 190; *R. v. Wroxtton*, 4 Barn. & Adol. 641.

(*x*) 4 Geo. 4, c. 76, s. 10. As to *licences*, see, also, Can. 101. In abolishing the jurisdiction of ecclesiastical courts and persons, in respect of matters matrimonial, the Act of 20 & 21 Vict. c. 85, makes an express exception with respect to marriage licences. (Sect. 6.)

(*y*) As to *special* licences, see 25 Hen. 8, c. 21; 4 Geo. 4, c. 76, ss. 10, 20; 6 & 7 Will. 4, c. 85, s. 1.

(*z*) See 10 & 11 Vict. c. 98, s. 5.

(*a*) 4 Geo. 4, c. 76, ss. 9, 19.

(*b*) As to churches (or chapels) in which marriages may lawfully take place, see 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 4 Geo. 4, c. 76, ss. 3, 4, 12, 13; 5 Geo. 4, c. 32; 6 Geo. 4, c. 92; 11 Geo. 4 & 1 Will. 4, c. 18; 6 & 7 Will. 4, c. 85, ss. 26—34; 7 Will. 4 & 1 Vict. c. 22; 1 & 2 Vict. c. 107, ss. 16, 33, 34; 7 & 8 Vict. c. 56; 20 Vict. c. 19, s. 9; 23 Vict. c. 24.

(*c*) 4 Geo. 4, c. 76, ss. 21, 28.

thereby altered, shall be duly observed (*g*). And as it is the policy of our law to prevent the marriage of persons under the age of twenty-one without the consent of parents or guardians,—the statute also provides, that in the case of the publication of banns of a person under twenty-one, not being a widower or a widow, (either of whom are deemed emancipated by their first marriage,) if the parent or guardian of the infant openly signifies his dissent at the time the banns are published, the publication shall be void. The Act also enacts, in furtherance of the same object, and to secure that the requirements of the law have been duly observed, that no licence to marry shall be granted, unless oath shall be first made by one of the parties that he or she believes that there is no impediment of kindred or alliance, or of any other lawful cause; and that one of the said parties hath, for the space of fifteen days immediately preceding such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where one of the parties (not being a widower or widow) shall be under the age of twenty-one years,—that the consent of the person or persons whose consent is required has been obtained; or, else, that there is no person existing with authority to give such consent. The consent required by the Act, is that of the father, or if the father be dead, then that of a guardian lawfully appointed (*h*). If there be no guardian, then of the mother being unmarried; and if there be no mother unmarried, then of any guardian appointed by the Court of Chancery (*i*). Provision is also

(*g*) 4 Geo. 4, c. 76, ss. 21, 28. This provision as to the observance of the rules of the rubric, is re-enacted by 6 & 7 Will. 4, c. 85, s. 1.

(*h*) 4 Geo. 4, c. 76, ss. 16–18. A *caveat* may be also entered by any person against the grant of a

licence, which is decided on by the ecclesiastical judge. (Sects. 11, 36.) If a minor be married by licence improperly obtained without the father's consent, the marriage is not thereby void. (*R. v. Birmingham*, 8 B. & C. 29.)

(*i*) 4 Geo. 4, c. 76, s. 16.

made for the case where the person whose consent is required is *non compos*; or where such person, being a guardian or the mother, is in parts beyond the seas, or unreasonably, or from undue motives, withholds consent to a proper marriage. The Act, in such cases, gives relief by petition to the Lord Chancellor (*k*).

In some instances, the neglect of the prescribed statutory formalities (though penal) does not invalidate the marriage (*l*). But it is declared by the Act that it shall be *null and void* to all purposes in the following cases (*m*), viz. if any persons shall knowingly and wilfully intermarry (unless by special licence) in a place other than a church or a public chapel wherein banns may be lawfully published (*n*); or shall knowingly and wilfully intermarry without due publication of banns, or else a licence from some person having authority to grant the same (*o*); or shall knowingly and wilfully consent to or acquiesce in the solemnization of their marriage by a person not being in holy orders. It is also made a *felonious* offence by this Act on the part of the minister, knowingly and wilfully to solemnize matrimony at any other time than between the hours of eight and twelve in the forenoon, unless by special licence; or without banns having been first duly published, unless by licence; or to solemnize it according to the office of the Church of England,

(*k*) 4 Geo. 4, c. 76, s. 17.

(*l*) See *R. v. Bramley*, 6 T. R. 331, n.; *R. v. Birmingham*, 8 Barn. & Cress. 29.

(*m*) The formalities prescribed by this Act and the consequences of their not being complied with, do not apply to a marriage under the later statute presently to be mentioned (*vide post*, p. 250 et seq.).

(*n*) See the statutes cited *sup.* p. 247, n. (*b*). There are also the following enactments confirming *past* marriages in particular cases;

3 Geo. 4, c. 75; 4 Geo. 4, cc. 5, 17, 91; 3 & 4 Will. 4, c. 45; 5 & 6 Will. 4, c. 54; 5 & 6 Vict. c. 113; 12 & 13 Vict. c. 68, s. 20; 14 & 15 Vict. c. 97, s. 25; 16 & 17 Vict. c. 122; 17 & 18 Vict. c. 88; 18 & 19 Vict. c. 66, c. 81, s. 13; 19 & 20 Vict. c. 70; 20 & 21 Vict. c. 29; 22 Vict. c. 24; 23 Vict. c. 1; 24 & 25 Vict. c. 16; 28 & 26 Vict. c. 81; 36 Vict. cc. 1, 25, 28.

(*o*) See *Midgley v. Wood*, 30 L. J. (N. S.) P. M. & A. 57.

under a false pretence of being in holy orders. And the Act also contains a provision, that when a valid marriage by licence or banns is solemnized between persons either of whom is under age, by means of the false oath or fraudulent procurement of one of the parties,—the party so offending shall be liable to forfeit all property which would otherwise accrue to him or to her from the marriage (*q*).

This Act adheres (it is to be observed), in the provisions which we have here summarily stated, to a principle long antecedently established, that all marriages taking place in England must be solemnized, (whatever the religious belief of the contracting parties,) by a minister in holy orders, and according to the rites and ceremonies of the Church of England:—the only exception admitted being where both of such parties were of the Quaker or of the Jewish persuasions. For these were allowed to marry according to their own usages (*r*). This principle, however, was at length felt to operate with intolerable harshness upon that numerous and important class who, not being either Quakers or Jews, yet dissent from the discipline and doctrines of the Church of England; and, accordingly, the Marriage Act of 6 & 7 Will. IV. c. 85—at the consideration of which we now arrive—introduced, in the year 1836, new regulations having principally in view the relief of Dissenters; though they also enable any persons who desire to do so, while marrying according to the ceremonial of the Church, to resort to a preliminary proceeding of a secular character, in lieu of either banns or ecclesiastical licence.

The regulations made by the 6 & 7 Will. IV. c. 85, and the Acts subsequently passed for its amendment (*s*)—provide that the officer called the “superintendent registrar,” appointed for any district, (under the 6 & 7 Will. IV.

(*q*) 4 Geo. 4, c. 76, s. 23.

(*r*) Ibid.

(*s*) These are 7 Will. 4 & 1 Vict.

c. 22; 3 & 4 Vict. c. 72; 19 & 20

Vict. c. 119, and 23 Vict. c. 18.

c. 86, in respect of births and deaths,) shall also be the superintendent registrar “of marriages” within the same district. And the Acts establish (in effect) two new modes of proceeding towards the celebration of marriage, in addition to those sanctioned by the 4 Geo. IV. c. 76, which we have already described. These are a marriage by the *registrar’s certificate without licence*, or by his *certificate with licence*.

The new modes of proceeding, (which are analogous to the distinction between the marriage by banns, and that by ecclesiastical licence,) are respectively as follows:—

1. A person intending to be married by *the registrar’s certificate without licence*, must deliver to the superintendent registrar of the district within which both the persons about to marry have dwelt for not less than seven days—or if they have dwelt in different districts for that time, then to the superintendent registrar of each district—a *notice* of his or her intention to marry, expressed as the Acts prescribe (*t*). And such notice is entered by the registrar, (who is entitled to the fee of one shilling for the entry,) into a book called *The Marriage Notice Book*; open at all reasonable times, and without fee, to all persons desirous of inspecting the same (*u*). This notice is to particularize the church or other building in which the marriage is to be solemnized,—which, as the general rule, must be within the district where one of the parties has dwelt for the period to which the notice refers (*x*),—

(*t*) See 6 & 7 Will. 4, c. 85, s. 4; 19 & 20 Vict. c. 119, s. 3, and Sch. (A). As to the course of proceeding where one of the parties intending marriage “without licence” dwells in *Ireland* or *Scotland*, see 19 & 20 Vict. c. 119, ss. 7, 8.

(*u*) 6 & 7 Will. 4, c. 85, s. 5.

(*x*) 3 & 4 Vict. c. 72, s. 1. The building stated in the notice, may, however, in the case of *Quakers*

and *Jews*, be one out of the district or districts in which the parties dwell (3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, s. 13); and in the case of *other* parties may also be so, where there is not within the district in which one of the parties dwells any registered building in which marriage may be solemnized in the form such parties desire to adopt. (3 & 4 Vict. c. 72, s. 2.) The

and it must also specify whether the marriage is to be without, or with licence. And the person giving the notice must also subscribe thereto, a solemn *declaration* that he or she believes that there is no impediment of kindred or alliance, or other lawful hindrance to the marriage; and that both the persons about to marry have, for the space of *seven* days immediately preceding, had their usual place of abode and residence within the district of the registrar to whom the notice is given; and (when either of such persons, not being a widower or widow, shall be under the age of twenty-one), that the consent of the person whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent is by law required (*y*). This notice, (or a copy thereof, under the hand of the registrar,) is suspended or affixed by him in some conspicuous place in his office, during *twenty-one* successive days next after the day when it was entered in the Marriage Notice Book (*z*).

The next step is to obtain a certificate of the notice having been duly entered. But it is provided that any person whose consent would have been required by law to the marriage of the contracting parties, under an *ecclesiastical* licence, immediately before the passing of the 6 & 7 Will. IV. c. 85 (*a*), shall be authorized to forbid the issue of such certificate (*b*); and may do so by writing "forbidden" opposite the entry of the notice, and subscribing

building stated may also be out of such district or districts, provided it be the usual place of worship of the parties, or one of them, and not more than two miles from the district in which the notice is given. (19 & 20 Vict. c. 119, s. 14.)

(*y*) See 19 & 20 Vict. c. 119, s. 2, Sch. (A).

(*z*) Sect. 4.

(*a*) Vide sup. p. 248.

(*b*) 6 & 7 Will. 4, c. 85, ss. 9, 10. A *caveat* may also (by sect. 13) be entered by *any* person against the grant of the certificate or licence by the registrar; and the validity of the objection is to be decided by such registrar,—subject, however, to an appeal to the "registrar-general." (As to the Registrar-General, vide post, bk. IV. pt. II. c. XV.)

thereto his or her name and place of abode, and the character in which he or she is authorized to interfere. And in case the issue of the certificate is thus lawfully forbidden, the notice and all proceedings thereon are utterly void (*c*). Supposing, however, that, during the period for which the notice has been suspended in the office, no valid impediment to the issue has been shown to the satisfaction of the registrar—nor the issue forbidden in manner above mentioned—the certificate, after the expiration of the twenty-one days, is to be issued upon the request of the person delivering the notice (*d*). Such certificate expresses that notice of the intended marriage in such a church or building has been duly entered, and that the issue of the certificate has not been forbidden by any person authorized so to do: and for this document the registrar is entitled to receive the fee of one shilling (*e*).

Immediately upon its being issued—or at any time afterwards within three calendar months from the entry of the notice—the marriage may take place (*f*); and it may be solemnized according to any one of several methods authorized in that behalf by the Acts. By one of these methods, the marriage may be solemnized in a *registered building*; that is, in any building *certified* according to law as a place of religious worship, and *registered* as a place for the solemnization of marriage; and it may then take place (subject to the provisions to be presently mentioned) according to such form and ceremony as the parties may think fit to adopt (*g*). But it is provided (*h*), that every such marriage shall be solemnized before some

(*c*) 6 & 7 Will. 4, c. 85, s. 9.

(*d*) See 19 & 20 Vict. c. 119, s. 4, and Sch. (B).

(*e*) 19 & 20 Vict. c. 119, s. 4.

(*f*) Ibid.

(*g*) 6 & 7 Will. 4, c. 85, ss. 18—20; 7 Will. 4 & 1 Vict. c. 22, s. 35.

As to certifying places of worship,

see 18 & 19 Vict. c. 81; 19 & 20 Vict. c. 119, s. 24. As to registering places for solemnization of marriages, 6 & 7 Will. 4, c. 85, ss. 18, 19; 19 & 20 Vict. c. 119, s. 17.

(*h*) 6 & 7 Will. 4, c. 85, s. 20.

“registrar of the district” (*i*), and two or more credible witnesses; and also that it shall be performed with open doors, between the hours of eight and twelve in the forenoon; and also that in some part of the ceremony, and in the presence of the registrar and witnesses, each of the parties shall say—“I do solemnly declare that I know “not of any lawful impediment why I, A. B., may not be “joined in matrimony to C. D.,” and, lastly, that each of the parties shall say to the other, “I call upon these persons here present to witness that I, A. B., do take thee “C. D., to be my wedded wife (*or* husband).” By another method of solemnization, the parties are permitted to contract marriage at *the office of the superintendent registrar*; and the ceremony is then to take place in his presence and in that of some registrar of the district, and also of two other witnesses; and is to be with open doors, and between the hours aforesaid; and the parties are to make the same declaration and use the same words, as in the case of marriage in a certified and registered place of worship (*k*). But it is provided, that at no marriage had in such office shall any *religious* service be read (*l*). A third method of solemnization is that of the Church of England: and there needs in such case neither publication

(*i*) As to this officer, (who is subordinate to the “superintendent registrar”) see 6 & 7 Will. 4, c. 85, ss. 17, 20, c. 86, s. 7; 1 Vict. c. 22; 19 & 20 Vict. c. 119, s. 15. He may act in the case of illness, or unavoidable absence, by *deputy*. (19 & 20 Vict. c. 119, s. 16.)

(*k*) 6 & 7 Will. 4, c. 85, s. 21.

(*l*) 19 & 20 Vict. c. 119, s. 12. By the same section it is, however, enacted, that if the parties to a marriage at the registry office, shall *desire* to *add* the service ordained or used for marriage by the church or persuasion

to which they are members,—they may present themselves for that purpose to the minister; who, on production of the certificate and payment of the customary fees (if any), may, *if he shall see fit*, read or celebrate such service accordingly. But he may not do so in any church or chapel of the Church of England, unless he is in holy orders; nor shall any such reading or celebration supersede or invalidate the marriage previously contracted, or be entered as a marriage in the parish register.

of banns nor ecclesiastical licence ; but the church in which the marriage is solemnized, must be one within the district of the superintendent registrar by whom the certificate is issued (*m*). And, fourthly, the marriage may also be solemnized according to the usages of the Quakers or according to the usages of the Jews,—where the parties are of those persuasions respectively (*n*). Such, then, are the different methods in which, in a marriage upon a registrar's certificate without licence, the solemnization may be had ; but as to each of them it is material to remark, that the building in which it takes place, must be the same which had been previously specified in the notice and certificate (*o*).

2. A person intending to be married by a *registrar's certificate with licence*, is to give a notice and obtain a certificate as in the former case ; and the course of proceeding and the state of the law applicable to such notice and certificate are in either case the same, subject only to the following differences :—First, if both the persons about to marry do not dwell in the same superintendent registrar's district, notice need not be given to the registrar of *each* district, but only to the registrar of the district in which *one* of such persons resides ; and it will be sufficient also if the notice states how long he or she has there resided, without making any statement of the same kind with respect to the other party (*p*). Secondly, the declaration in the notice must state that the person giving it hath, for the space of *fifteen* days (instead of *seven* days) immediately preceding, had his or her usual place of abode and residence within the district of the registrar to whom

(*m*) 6 & 7 Will. 4, c. 85, ss. 1, 4 ; 7 Will. 4 & 1 Vict. c. 22, s. 36.

(*n*) See 6 & 7 Will. 4, c. 85, ss. 2, 39 ; 3 & 4 Vict. c. 72, s. 5 ; 19 & 20 Vict. c. 119, s. 21 ; 23 Vict. c. 18 ; 35 Vict. c. 10. As to Jewish marriages and divorces, see *Moss v. Smith*, 1 Man. & Gr. 232, and the

authorities there cited. See also 10 & 11 Vict. c. 58, passed to remove doubts as to certain marriages solemnized in England before 1st July, 1837, and in Ireland before 1st April, 1845.

(*o*) 6 & 7 Will. 4, c. 85, s. 42.

(*p*) 19 & 20 Vict. c. 119, s. 6.

the notice is given (*q*). Thirdly, it is not requisite that either the notice or a copy should be affixed in the office of such registrar (*r*). Fourthly, the certificate may be obtained after the expiration of *one* whole day (instead of *twenty-one* days) next after the entry of the notice (*s*).

Besides the certificate, and at the same time with it, the registrar—supposing, as before, that no lawful impediment has been shown, and that the certificate has not been forbidden,—is also to issue, as prescribed by the Acts, a *licence* for the marriage (*t*); and for this, he is entitled to receive from the party requiring the same the sum of 1*l.* 10*s.* over and above the amount paid for the necessary stamps on the instrument (*u*).

After the issue of the licence, and within three calendar months from the entry of the notice, the marriage may take place (*x*);—and it may be solemnized according to any of the several methods before stated, except that of the Church of England,—subject to the rules and distinctions already laid down in respect of them (*y*). But it is provided that the registrar may not grant any licence for marriage in a church or chapel of the Church of England (*z*),—it being the design of the legislature not to interfere with the exclusive privilege in that respect, before vested in the archbishop and other authorities.

It is also provided by the Acts, that no marriage upon the certificate of a registrar, shall be solemnized in any building registered and certified for religious worship, without the consent of the minister thereof,—or of one of the trustees, overseers, deacons or managers;—nor in any registered building of the *Church of Rome*, without the consent of the officiating minister; nor in any church or chapel of the Church of England, without the consent of

(*q*) 19 & 20 Vict. c. 119, s. 2.

(*r*) Sect. 5.

(*s*) Sect. 9.

(*t*) Sects. 9, 21, Sch. (C).

(*u*) Sect. 10.

(*x*) Sect. 9, and Sch. (C).

(*y*) 6 & 7 Will. 4, c. 85, ss. 2, 20—22; 19 & 20 Vict. c. 119, s. 21.

(*z*) 6 & 7 Will. 4, c. 85, s. 11.

the minister thereof; nor shall any such marriage be solemnized in any such church or chapel by any other than a duly qualified clergyman, or with any forms or ceremonies other than those of such Church (*a*).

The Acts provide moreover that, whenever a marriage shall not be had within three calendar months after the entry of the notice,—such notice, and any certificate and licence which may have been granted, and all other proceedings thereupon, shall be utterly void (*b*); and that if any persons knowingly and wilfully intermarry in a place other than that specified in the notice and certificate, or without due notice to the superintendent registrar, or without certificate duly issued, or without licence (where licence is required), or in the absence of the registrar of the district or of the superintendent registrar (where his or their presence is required),—the marriage shall be *null and void* (*c*); and further, that a valid marriage, procured by means of a wilfully false notice, certificate, or declaration, shall expose the party offending to the same consequences as are provided under the Marriage Act of 4 Geo. IV. c. 76, with regard to marriages procured by false oath or fraudulent procurement, viz. a forfeiture of all the property which would otherwise accrue to him or to her from the marriage (*d*). It is further enacted, that every person shall be deemed guilty of *felony* who shall knowingly and wilfully solemnize marriage (except by special licence) in any other place than in a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate (*e*); or who shall, in a registered building or office,

(*a*) 19 & 20 Vict. c. 119, s. 11.

(*b*) 6 & 7 Will. 4, c. 85, s. 15; 7 Will. 4 & 1 Vict. c. 22, s. 3; 19 & 20 Vict. c. 119, Sch. (B).

(*c*) 6 & 7 Will. 4, c. 85, s. 42.

(*d*) Sect. 43; 19 & 20 Vict.

c. 119, s. 19; vide sup. p. 250.

(*e*) 6 & 7 Will. 4, c. 85, s. 39.

The case of a marriage between two Quakers, according to the usages of the Society of Friends, or between two persons professing the Jewish

solemnize marriage in the absence of a registrar of the district; or who shall solemnize marriage (except by licence) within twenty-one days after the entry of the notice; or, if the marriage is by licence, within seven days after such entry; or (whether the marriage be by licence or not), after three calendar months from such entry.

It is further to be observed, with respect to all marriages, whether taking place under the 4 Geo. IV. c. 76, or under the more recent Acts, that they are required by law to be *registered*. For it is provided by 6 & 7 Will. IV. c. 86, (which deals with the registration of *marriages* as well as of births and deaths,) that, where a marriage takes place in a church, the clergyman shall, immediately after the office of matrimony is solemnized by him, register the same in duplicate in two of the marriage register books, in a prescribed form; and that every rector, vicar, or curate (as the case may be), shall deliver to the superintendent registrar of the district, in April, July, October, and January, in every year, a copy (certified under his hand, and on durable materials) of all entries of marriages in the register book for the current quarter: and that one copy of every such registry book, when filled, shall be delivered by the clergyman to such registrar, and that the other copy shall remain in his own keeping with the other parish registers (*g*). And where the marriage takes place in a registered building, or in the office of the superintendent registrar, or according to the usages of the Quakers or of the Jews, there are provisions to the same effect. The duty of registration, however, is committed in the two first of these cases, to the registrar of marriages for the district; in the last two, to

religion, according to the usages of the Jews, is excepted from this provision. (6 & 7 Will. 4, c. 85, ss. 2, 39.)

(*g*) See 7 Will. 4 & 1 Vict. c. 22, for further provisions as to regis-

tration, and 3 & 4 Vict. c. 92 (amended by 21 & 22 Vict. c. 25), as to the custody and admissibility in evidence of certain non-parochial registers and records.

the registering officer among the Quakers, and to the secretary of the Synagogue among the Jews (*h*).

Moreover, we may remark that none of these marriage Acts extend to the royal family; nor to any marriage taking place out of England (*i*). With respect, therefore, to those contracted by British subjects in Scotland or Ireland, or in any foreign country, they are considered as valid by our law, so far as the manner of them is concerned, if made in such form as is deemed sufficient in the place where contracted (*k*): and the case appears to be the same, though the parties eloped to that country on purpose to evade the laws of marriage in this (*l*). It is also declared and enacted by 4 Geo. IV. c. 91, that marriages solemnized by a minister of the Church of England in the chapel or house of a British ambassador or resident minister, or in the chapel of a British factory abroad, or in the house of any British subject residing at such factory; or by a chaplain (or officer or other person officiating by authority of the commanding officer) within the lines of a British army abroad (*m*)—shall be as valid as

(*h*) 6 & 7 Will. 4, c. 86, s. 31 et seq.; 19 & 20 Vict. c. 119, s. 22.

(*i*) As to marriages in *India*, see 14 & 15 Vict. c. 40.

(*k*) See *R. v. Brampton*, 10 East, 282; *Lantour v. Teesdale*, 2 Marsh. 243; *Doe v. Vardill*, 5 Barn. & Cress. 438; 6 Bing. N. C. 385; *Scrimshire v. Scrimshire*, 2 Hagg. 395; *Macleane v. Cristall*, 7 Ecc. & Mar. Cas. 17. By the Act, however, of 19 & 20 Vict. c. 96, (for amending the law of marriage in Scotland,) “no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for

“twenty-one days next preceding such marriage, any law, custom, or usage to the contrary notwithstanding.” As to whether a

marriage contracted in a foreign country by a British subject is dissoluble by the new Divorce Court, see *Forster v. Forster and Berridge*, 4 B. & Smith, 187.

(*l*) *Compton v. Bearcroft*, Bul. N. P. 113; Co. Litt. by Harg. 79 b, n. (1); *Ex parte Hall*, 1 Ves. & B. 112; *Dalrymple v. Dalrymple*, 2 Hagg. 52. It is otherwise if the *marriage itself* is one prohibited by the laws of this country, as in the case of one contracted with the wife's sister, as to which vide sup. p. 244, n. (*d*).

(*m*) This statute applies, though

if solemnized in the British dominions in due form of law. By 12 & 13 Vict. c. 68, it is also enacted that all marriages solemnized as thereby provided, in any foreign place where there shall be a British consul duly authorized to act in that behalf, shall be in like manner valid,—provided either of the parties thereto be a subject of the realm. The course of proceeding authorized in this statute is, that the consul, on receiving due notice, may (if it be desired) grant a *licence* for the marriage; and may—seven days after such notice, if the marriage is to be by licence, or twenty-one days after, if it is to be without licence—at the British consulate, with open doors, between the hours of eight and twelve in the forenoon, and in the presence of two or more witnesses,—proceed either himself to solemnize the same, or (at the option of the parties) to allow the same to be solemnized in his presence; and that, either according to the rites of the Church of England, or according to any other form and ceremony the parties may see fit to adopt. And such marriage is to be afterwards registered in accordance with the Act for registering marriages in England, so far as the circumstances of the case will admit (*n*).

Moreover, by 28 & 29 Vict. c. 64, it is now further provided that every law made by the legislature of any of Her Majesty's possessions abroad, for the purpose of establishing the validity of any marriage contracted therein, shall give it the same validity out of the limits of such possession as it would, previously to that Act, have given within

there be no actual hostility at the time. (The Waldegrave Peerage, 4 Cl. & Fin. 649.)

(*n*) Vide sup. p. 258. By 12 & 13 Vict. c. 68, s. 20, the validity of certain past marriages abroad, celebrated under such forms as the Act enumerates, is confirmed. See also 17 & 18 Vict. c. 88; 21 & 22 Vict.

c. 46; and 22 & 23 Vict. c. 64, confirming certain marriages abroad; 23 & 24 Vict. c. 86, confirming marriages in the Ionian Islands, and making provision for future marriages there. 30 & 31 Vict. c. 93, legalizing certain marriages solemnized at Morro Velho in Brazil.

those limits,—provided, however, that no marriage shall be thereby made valid, unless the parties thereto were competent to contract the same according to the law of England.

II. Having thus shown how marriage may be made, we are next to examine its legal effect and consequences (*o*).

For some purposes, the husband and wife become, by their marriage, a single person in the eye of the law (*p*). It is accordingly a principle that a man cannot in general grant anything to his wife, or enter into covenant with her; that no action can be brought one against the other (*q*); and that all compacts between them, made before marriage, are avoided by their becoming husband and wife (*r*). The husband, however, may grant to or contract with a third person as trustee for his wife (*s*); and, by conveying land to a third person to her use, he may confer upon her the legal estate therein (*t*). He may also devise or bequeath anything to her by will; for that cannot take effect till the union is severed by his death (*u*). So also where the wife acts in the execution of a mere power or authority, she may convey an estate to her husband. Thus, if she has authority under a will to sell, she may effectually sell to *him* (*v*). She may also be agent (or attorney) for her husband; for that implies no separation from, but is rather a representation of, her lord (*x*).

With a view to this principle of the husband and wife forming together one legal person, and to the identity of interest which in the nature of things must always exist between them—and in part also to the policy of prevent-

(*o*) The modifications of the legal aspect of marriage which have been introduced by the courts of equity are noticed post, p. 272.

(*p*) Co. Litt. 112 a.

(*q*) Ibid; *Beard v. Beard*, 3 Atk. 72.

(*r*) 8 Rep. 136 a.

(*s*) Co. Litt. ubi sup.

(*t*) Vide sup. vol. 1. p. 544.

(*u*) Co. Litt. ubi sup.

(*v*) Ibid.

(*x*) 1 Bl. Com. 442. See *Prince v. Brunatte*, 1 Bing. N. C. 438; *McGeorge v. Egan*, 5 Bing. N. C. 196.

ing as much as possible all occasions for domestic dissension or distrust—it long remained a fundamental rule of our law of evidence, that persons standing in this connection could not in trials of any sort, whether civil or criminal, be received as witnesses for or against each other (*y*); though the doctrine was subject to certain exceptions:—for in a criminal prosecution against the husband for treason, or for violence to the person of his wife, the evidence of the latter (in the first case, on account of the tie of allegiance, in the other, on the ground of evident necessity,) was always admitted (*z*). But in recent times it has been deemed expedient greatly to relax the rules of the former law on this subject; which must now be taken in connection with the provisions on this head contained in the 14 & 15 Vict. c. 99; the 16 & 17 Vict. c. 83; and the 32 & 33 Vict. c. 68, by which the husbands and wives of the parties to the proceedings are made both competent and compellable to give evidence, save only,—1. That in *criminal* proceedings, no husband is thereby made competent or compellable to give evidence for or against his wife—or any wife competent or compellable to give evidence for or against her husband; and, 2. That no husband is thereby made compellable to disclose any communication made to him during the marriage by his wife, nor any wife to disclose any communication made to her during the marriage by her husband (*a*).

The principle of identity with her husband does not extend to the Queen, whether regnant or consort: who is considered by our law as a *feme sole*, or single woman (*b*).

But though the wife is thus considered in law for some

(*y*) Hawk. b. 2, c. 46, s. 16; 1 Hale, P. C. 301; Wedgwood v. Hartley, 10 Ad. & El. 619.

(*z*) 1 Chit. Bl. 444, n.; Lord Audley's case, State Trials; 1 Hale, P. C. 301; 1 East, P. C. 454.

(*a*) In the 16 & 17 Vict. c. 83 (and in the previous statute of 14

& 15 Vict. c. 99) the evidence of the wife or husband for or against each other was also excluded in proceedings instituted in consequence of *adultery*, but this was repealed by 32 & 33 Vict. c. 68, s. 1.

(*b*) Finch, L. 86.

purposes as the same person with her husband, she is in other points of view held to be a distinct but subordinate person; being under his cover, protection, and influence, and therefore called in our law-French, a *feme covert*, *fæmina viro cooperta*(c); and for the same reason, her condition during her marriage is called her *coverture*(d). The effect of such coverture may be considered, more particularly, in respect, 1. of her person; 2. of her property; 3. of her contracts and other transactions.

1. [*As to her person.* The custody of this belongs of right to her husband (e), and by some antient authorities it was considered so far under his power, that he might give her moderate correction; though it was also held that this right was confined within reasonable bounds; and that the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causâ regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet* (f). Indeed the Roman law gave the husband the same or a larger authority over his wife: allowing him for some misdemeanors, *flagellis et fustibus acriter verberare uxorem*; for others, only *modicam castigationem adhibere*(g). But with us, in the reign of Charles the second, this power of correction began to be doubted (h); and a wife may now have security of the peace against her husband (i), or, in return, a husband against his wife (k). Yet the courts of law will still permit a husband to restrain his wife of her liberty, in case of any gross misbehaviour (l).]

2. *As to property.* And, in the first place, any *freehold estate* of which the wife is seised at the time of the marriage, or (subject to an exception presently to be men-

(c) 1 Bl. Com. 444.

(d) Ibid.

(e) See *In re Cochrane*, 8 Dowl. 635, and the authorities there cited.

(f) Moore, 874; F. N. B. 80.

(g) Nov. 117, c. 14, and Van Leeuwen in loc.

(h) 1 Sid. 113; Lord Leigh's case, 3 Keb. 433.

(i) Lord Leigh's case, ubi sup.; 2 Lev. 128.

(k) Sim's case, Str. 1207.

(l) See *R. v. Lister*, Str. 478; *Child v. Hardyman*, ibid. 875; *In re Cochrane*, 8 Dowl. 630.

tioned) of which she shall become seised afterwards, becomes by law vested in her husband and herself during the coverture, and the husband is entitled to the profits, and has the sole control and management (*m*); though he cannot convey or charge the lands for any longer period than while his own interest continues, except in the way of a lease for a term not exceeding twenty-one years, under the statute of 19 & 20 Vict. c. 120, as was explained in a former volume (*n*). And if the wife has been seised during the marriage in actual possession of an estate *of inheritance*, (whether in fee simple or fee tail,) and there has been a child of the marriage born alive and capable of inheriting the property,—then the husband, upon her decease, becomes solely seised of such estate for his life; and is said in that case (as we have also seen) to be *tenant by the curtesy of England* (*o*). But subject to these limited rights of the husband, the freeholds of the wife are not affected by the marriage, nor are they liable for his debts. With regard to their alienation, indeed, there was, originally, no mode by which they could, even with the husband's concurrence, be conveyed during coverture; for the rigour of the antient law declared a wife incapable, in any case, of binding herself or her heirs in any direct mode of alienation (*p*). Indirect modes were, however, introduced in a very distant age; and the reader will remember that, till lately, the ordinary mode was by the fictitious proceeding called *levying a fine*, in the course of which she was privately examined, whether her act was voluntary (*q*); but that now, under the provisions of 3 & 4

(*m*) 1 Wms. Saund. 253, n. 4.
See Robertson *v.* Norris, 11 Q. B. 916.

(*n*) Bac. Ab. Leases, (C.); 2 Saund. by Wms. 180, n. (*q*); 19 & 20 Vict. c. 120, s. 32; vide sup. vol. I. pp. 252, 257.

(*o*) Litt. s. 35; vide sup. vol. I. p. 263.

(*p*) As to the disability of married women in respect to the conveyance of real estate, vide sup. vol. I. p. 476.

(*q*) As to fines and recoveries, and the statute 3 & 4 Will. 4, c. 74, substituting new methods for them, vide sup. vol. I. pp. 588 et seq.

Will. IV. c. 74, a married woman is at liberty, with the concurrence of her husband, to make free disposition of her real estate by any deed duly acknowledged under that Act (*s*).

As to the *leaseholds* of which the woman is possessed at the time of the marriage, or which (with the exception presently to be noticed) accrue to her during coverture, the husband becomes by the marriage possessed of them in her right (*t*). And he is not only entitled to the profits and management during their joint lives, but he may also dispose of these as he pleases, by any act during the coverture; and they are liable for his debts; and if he survive her, they are absolutely his (*u*). But he cannot (in her lifetime) bequeath them by will (*x*); and if he does not part with them before death, and she survives him, they remain to her by virtue of her original title, and shall not go to his executors, nor (if he die intestate) to his administrators (*y*). It is also to be observed, that these rights of the husband do not extend to property held by the wife in *autre droit*, (as in the capacity of executrix,) but only to property of which she is possessed in her own right (*z*).

With respect to the *personal chattels* of the wife belonging to her at the time of the marriage, or (with the exception presently to be noticed) accruing to her during coverture, they become in general the absolute property of the husband (*a*). But this does not apply to property to which she is entitled in *autre droit* (*b*). And with respect to choses in action—such as debts due to the wife before her marriage,—they do not in general become the husband's

(*s*) 3 & 4 Will. 4, c. 74, ss. 77—80.

(*t*) Co. Litt. 46 b, 351 a, 300 a; Rast. 655 a; see Wallis v. Harrison, 5 Mee. & W. 142.

(*u*) Com. Dig. Bar. & Feme, E. 2; 2 Bl. Com. 434.

(*x*) Plowd. 418; Com. Dig. ubi sup.; Bl. Com. ubi sup.

(*y*) Bl. Com. ubi sup.

(*z*) Ibid.; 1 Roll. Ab. 88.

(*a*) See Co. Litt. 351 b; Bl. Com. ubi sup.; Ayling v. Whicher, 1 Nev. & Per. 416; Carne v. Price, 7 Mee. & W. 183.

(*b*) Co. Litt. ubi sup.; see Went. Off. Ex. 7.

until he recovers them by law, or reduces them into possession (*c*). And if he die before this is done, they remain to the wife. So if she die before he has recovered or reduced them into possession, they are part of her estate (*d*). But, in this last case, as he is entitled to obtain administration of her effects, he becomes the owner of them in right of that title. And we may here also notice that the *paraphernalia* of the wife, viz. her bed, apparel and ornaments suited to her degree, if not disposed of by the husband in his lifetime, remain to her, if she survives him, instead of passing to his representatives.

The law as above stated in regard to the effect of marriage with respect to property must, however, be taken as affected in some instances by certain modern enactments. For, first, with regard to property coming to the wife during marriage, it has been provided by the Married Women's Property Act, 1870, that where any freehold, copyhold or customaryhold property shall descend upon any woman who was married after the passing of that Act (viz. 9th August, 1870) as heiress or co-heiress of an intestate—or where such woman shall during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding 200*l.* under any deed or will—the rents and profits or the property itself shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge of the same (*e*). Secondly, with regard to alienations of a wife's reversionary interests in personal estate, vested or contingent, it was provided by 20 & 21 Vict. c. 57, that she may dispose of these (unless restrained by the instrument under which she is entitled thereto, and unless they are secured to her by her marriage

(*c*) Co. Litt. 351 b; 2 Bl. Com. 434. See *Sherrington v. Yates*, 12 Mee. & W. 855; *Scarpellini v. Acheson*, 7 Q. B. 875; *Fitzgerald v.*

Fitzgerald, 8 C. B. 592.

(*d*) See *Fleet v. Perrins*, Law Rep., 3 Q. B. 536; 4 Q. B. 500.

(*e*) 33 & 34 Vict. c. 93, ss. 7, 8.

settlement) by a deed in which her husband concurs, and which is duly acknowledged in the manner required by 3 & 4 Will. IV. c. 74, with regard to her conveyance of real estate (*f*).

Thirdly, we must advert to the recent provisions contained in 20 & 21 Vict. c. 85, 21 & 22 Vict. c. 108, and 27 & 28 Vict. c. 44, under which it is enacted, that if a wife is *deserted* by her husband without reasonable cause, she may obtain (at petty sessions, or from a stipendiary magistrate or from the judge ordinary) an order under which any money or property she shall acquire by her own lawful industry, or become possessed of after his desertion, will be *protected* and belong to her as if she were a *feme sole* (*g*).

Finally, by the Married Women's Property Act, already mentioned, it is now provided, that the wages and earnings of a wife (whenever married) which shall be acquired or gained by her after the 9th August, 1870, in any employment, occupation or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic or scientific skill (and all investments thereof), shall be deemed and taken to be property held and settled to her separate use, independent of any husband, and that her receipts alone shall be a good discharge for such wages, earnings, money and property; and by the same statute a wife (whenever married) is also enabled to

(*f*) Vide sup. vol. I. p. 583.

(*g*) See *Ex parte Mullineux*, 1 Swab. & Trist. 77; *Re Aldridge*, *ibid.* 88; *Re Worman*, *ibid.* 513. It may be remarked that if a husband runs away and leaves his wife and family chargeable to a parish, he may be convicted under the Vagrant Act (5 Geo. 4, c. 83, s. 4), and imprisoned for three calendar months, with hard labour. But if he be a pauper, his wife is entitled to be relieved as part of his

family, under the poor law; and by 7 & 8 Vict. c. 101, s. 25, when the husband is beyond the seas, or in confinement as a criminal or a lunatic, she is entitled to relief as if she were his widow. On the other hand, if the husband is chargeable as a pauper, and his wife has any *separate property* under the Married Women's Property Act, 1870, she may be compelled to maintain *him*. (33 & 34 Vict. c. 93, s. 13.)

effect an insurance upon her own or her husband's life for her separate use (*d*), and also to acquire property independent of her husband in such deposits as she shall have made in a savings bank or shall have invested in the funds, in a joint-stock company, or in an industrial, provident, friendly, benefit building, or loan society—provided always, that she shall not have used his monies without his consent, and shall not have deposited or invested in fraud of his creditors (*e*).

The reader will not fail to observe, that even taking into account the provisions, just referred to, recently passed, the law still gives the husband extensive rights over the property of his wife, while at the same time it affords her some compensatory advantages. For, first, unless some step has been taken to defeat or abridge her right, she is entitled, (we may remember,) in the event of her surviving him, to *dower*; that is, to hold to herself for the term of her natural life the third part of all the lands and tenements of which he was seised in fee simple or fee tail at any time during the coverture, and of which any issue that she might have had could have been heir (*f*). And besides this provision after his death, the husband is liable during his life to maintain her, that is, provide her with necessaries according to his station in life; and if he fail to do so, she has power to provide herself with them, at his expense, in the manner to be presently stated (*g*).

3. *As to her transactions*, it may first be remarked, that a married woman may in all cases act independently of her husband in *autre droit*,—as where she is executrix, or exercises any mere authority or power with which she is invested on behalf of a third person (*h*). But in respect of

(*d*) 33 & 34 Vict. c. 93, s. 10.

(*e*) Sects. 2, 3, 4, 5, 6.

(*f*) Litt. ss. 36, 53; vide sup. vol. I. p. 269.

(*g*) See *Etherington v. Parrot*, Lord Raym. 1003; *Montague v.*

Benedict, 3 Barn. & Cress. 635.

(*h*) See Com. Dig. Bar. & Feme (P); *Prince v. Brunatte*, 1 Bing. N. C. 438; *Pemberton v. Chapman*, 1 Ell. Bl. & Ell. 1056. If sued while acting *en autre droit*, her husband

transactions on her own account, her coverture subjects her to a variety of disabilities. She is incompetent, except under special circumstances, to make a will, either of lands or chattels (*i*). She is incapable generally of contracting, or of doing any other act which will bind either herself or her husband (*j*),—unless by his express or implied authority (*k*),—and acts done by her of her own authority with that intention, are merely void (*l*). She is also, in general, incapable of bringing any action at law to obtain redress for an injury sustained in her person or property, unless it be brought with her husband's concurrence; and in his name as well as her own (*m*). But it has been provided by the same Married Women's Property Act, 1870, that she may maintain an action in her own name for the recovery of any wages, earnings, money and property declared by that Act to be her separate property (*n*), or for the recovery of any property belonging to her before marriage, and which her husband shall in writing under his hand have agreed with her shall belong to her after marriage as her separate property (*o*). In consideration of her general incapacity to sue, the law excepts a married woman, in all rights and causes of action accruing to her during coverture, from those limitations of time within which other persons are bound to assert their legal claims; and allows her for that purpose a certain period after the coverture is determined (*p*). There are also, with respect to the disabilities above enumerated,

must be joined with her. (See *Monnson v. Bourn*, Cro. Car. 510.)

(*i*) Vide sup. p. 186.

(*j*) Co. Litt. 112 b.

(*k*) See *McGeorge v. Egan*, 5 Bing. N. C. 196; *Lane v. Ironmonger*, 13 Mee. & W. 368; *Lindus v. Bradwell*, 5 C. B. 583; *Brown v. Ackroyd*, 5 Ell. & Bl. 819; *Johnsou v. Sumner*, 3 H. & N. 261.

(*l*) 1 Bl. Com. 444; Com. Dig. Bar. & Feme.

(*m*) See *Eubanke v. Owen*, 5 Ad. & El. 298; *Ayling v. Whicher*, 6 Ad. & El. 259.

(*n*) Vide sup. p. 267.

(*o*) 33 & 34 Vict. c. 93, s. 11.

(*p*) It may be presumed that the exceptions in favour of a married woman contained in the Statutes of Limitation, would be held not to extend to actions brought by her in virtue of the Married Women's Property Act, 1870.

several other points which require attention. First, as the husband is bound to maintain her, her contracts made for the purpose of supplying herself with such necessities as are suitable to her station as his wife, will in general be binding upon him, though not upon herself (*q*). For if they be living together, his authority to her to act as his agent, to that extent, will *primâ facie* be presumed; though the presumption is capable of being repelled by special circumstances,—as by notice to the particular tradesman not to trust her (*r*). And not only while they cohabit, but even in the event of a separation *by consent*, the husband is in general liable on her contracts for supplies of this description, if no sufficient provision be otherwise made for her (*s*); for the tradesman is then considered (even though he have notice not to trust her), as standing in her place, and as enforcing indirectly her right to be maintained (*t*). But the husband incurs no such liability if she depart from him against his will, and without sufficient excuse arising from his ill-treatment (*u*); or be dismissed from him for adultery; or if, during the separation, she shall commit adultery (*v*); or if she have a separate allowance secured to her, and regularly paid (*x*). A wife may also

(*q*) See *Knox v. Bushell*, 3 C. B. (N. S.) 334; *Phillipson v. Hayter*, Law Rep., 6 C. P. 38.

(*r*) See *Manby v. Scott*, 1 Sid. 109; *Etherington v. Parrot*, Lord Raym. 1006; *Seaton v. Benedict*, 5 Bing. 28; *Reid v. Teakle*, 13 C. B. 627; *Reneaux v. Teakle*, 8 Exch. 680; *Johnson v. Sumner*, 3 H. & N. 261.

(*s*) See *Baker v. Sampson*, 14 C. B. (N. S.) 383; *Bazeley v. Forder*, Law Rep., 3 Q. B. 559; *Dear v. Sontten*, ib., 9 Eq. Ca. 151.

(*t*) See *Bolton v. Prentice*, Str. 1214; *Montague v. Benedict*, 2 B. & C. 635; *Hunt v. De Blaquiére*, 5 Bing. 550; *Mainwaring v. Leslie*,

2 C. & P. 505; *Edwards v. Towells*, 5 Man. & G. 624; *Read v. Legard*, 6 Exch. 636; *Brown v. Ackroyd*, 5 Ell. & Bl. 819.

(*u*) See *Child v. Hardyman*, Str. 875; *Horwood v. Heffer*, 3 Taunt. 421; *Houliston v. Smith*, 3 Bing. 127; *Atkins v. Pearse*, 2 C. B. (N. S.) 763.

(*v*) See *Symes v. Goodfellow*, 2 Bing. N. C. 532; *Cooper v. Lloyd*, 6 C. B. (N. S.) 519.

(*x*) See *Hunt v. De Blaquiére*, ubi sup.; *Mizen v. Pick*, 3 Mee. & W. 481; *Willson v. Smyth*, 1 B. & Ad. 801; *Grindell v. Godmond*, 5 Ad. & El. 755; *Johnson v. Sumner*, ubi sup.; *Biffin v. Bignall*, 7 H.

contract as a *feme sole* so as to bind herself, and may sue or be sued, become bankrupt, or do any other act as a *feme sole*, in case her husband be civilly dead (*y*); or where (by the custom of the city) she carries on trade within the city of London on her own sole account, and without any interference on the part of her husband (*z*).

While a woman's coverture thus subjects her to various disabilities, it entitles her on the other hand to certain protections or privileges. For, first, she cannot be sued, in general, in a civil action, either on contract or for a tort, without making her husband a joint defendant (*a*); and, until recently, this was the rule not only in regard to causes of action arising against her after the marriage, but also to her debts contracted before that period. For he was considered as responsible for her in respect of all demands of a civil nature, having by the marriage adopted her and her circumstances together (*b*). But when the Married Women's Property Act, 1870, allowed her to acquire for herself property separate from her husband, it was thought right to relieve him from this responsibility; and it is accordingly now provided by that Act that a husband shall not, by reason of any marriage taking place after the 9th August, 1870, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for,—and any property belonging to her for her separate use shall be liable to satisfy,—such debts, in the same manner as if she had continued unmarried (*c*).

& N. 877; *Richardson v. Du Bois*, Law Rep., 5 Q. B. 51. By 20 & 21 Viet. c. 85, s. 26, if, upon a *judicial separation*, alimony has been decreed and not duly paid by the husband, he is liable for necessities supplied to her. (See *Wilson v. Ford*, Law Rep., 3 Exch. 63.)

(*y*) See Co. Litt. 133 a; *Marshall v. Rutton*, 8 T. R. 545; *Marsh v. Hutchinson*, 2 Bos. & Pul. 226. As to the case of her husband being an

alien enemy, see *Barden v. Keverberg*, 2 Mee. & W. 65; *De Wahl v. Braune*, 1 H. & N. 178.

(*z*) See *Lavie v. Phillips*, 3 Burr. 1776; *Beard v. Webb*, 2 B. & P. 93, 101.

(*a*) 1 Bl. Com. 443.

(*b*) Bl. Com. ubi sup. See *Tracey v. M'Arlton*, 7 Dowl. 532; *Dodgson v. Bell*, 5 Exch. 967.

(*c*) 33 & 34 Viet. c. 93, s. 12.

There are also cases in which her coverture protects a wife from criminal prosecution; and that absolutely, so that she cannot even be indicted jointly with her husband. For a *feme covert* is not liable to be prosecuted at all for some felonies committed by her in the presence of her husband (*d*),—the law supposing her to act in such cases under his coercion (*e*). But the exemption extends not to treason, murder, or manslaughter (*f*); nor to any crime whatever committed by her in the absence of her husband (*g*), or even in his presence, if the evidence shows that she was acting voluntarily, and was the principal instrument (*h*). And where she is liable as a criminal, she may be indicted as such (in general), without making her husband a joint defendant,—contrary to the general rule which obtains (as already stated) in a civil action.

Having thus examined the rules of the common law with regard to the conjugal relation, it now becomes desirable to advert to the manner in which these doctrines are modified by the principles of equity.

And, first, though the courts of law do not recognize any contract or direct grant between husband and wife, such gifts are often considered as effectual in the courts of equity (*i*). So, also, these courts will take cognizance of any trust created in favour of the wife, whether by the husband or a stranger; and, in administering that jurisdiction, will take views of the rights of a *feme covert* materially different in some respects from those of the common law. For though by that law her property (with the qualifications already stated) vests in her husband in such manner that

(*d*) See 1 Hale, P. C. 45, 516; Hawk. b. 1, c. 1, s. 9; 1 Bl. Com. 444; post, vol. IV. bk. IV. ch. II.

(*e*) 1 Bl. Com. 444.

(*f*) 1 Hale, P. C. 47.

(*g*) Russ. & Ry. 27. As to the case of her obtaining money under the fraudulent pretence of being a

feme sole, see Liverpool Adelphi Loan Association v. Fairhurst, 9 Exch. 422.

(*h*) 1 Hale, P. C. 516.

(*i*) See Lucas v. Lucas, 1 Atk. 271; Slaunnon v. Style, 3 P. Wms. 334.

she can have no separate property, yet in contemplation of equity, she has always a separate and independent estate in whatever property or interest is secured to her through the medium of a *trustee*,—provided the intention of the grantor be distinctly declared, that she should have it to her *sole and separate use* (*j*). And as it is a rule in equity that a trust shall never fail for want of a trustee, it follows that where the intention to give her a separate benefit is clear, she will be held in equity to take a separate estate, even though the donor should have omitted to name any trustee, and the estate consequently vests at common law in the husband; for to effectuate such intended trust the court will, if necessary, consider the husband himself as her trustee (*k*). It is true that where a married woman becomes entitled during the coverture to any equitable property *not* settled to her separate use, the courts of equity will follow the principle of the common law, so far as to allow the husband to claim it as his own; but even in that case they will not assist his claim, except upon condition of his making an adequate provision for her out of the fund,—unless indeed she already enjoys a competent settlement, or freely consents to its being paid over to him without condition (*l*). It is also to be observed, that in respect of any trust property settled to the separate use of the wife, the courts of equity have always allowed her to sue her husband, or be sued by him, without regard to the relationship between them (*m*).

A court of equity will also allow the estate of a married woman, settled on her to her separate use, to be conveyed or charged by her at her pleasure, though by the rule of the common law she is generally incapable, as we have

(*j*) Fonb. Tr. Eq. 94. See, as to a limitation in these terms, In re Tarsey's Trust, Law Rep., 1 Eq. Ca. 561; Moore v. Webster, ib., 3 Eq. Ca. 267; Massey v. Rowen, ib., 4 Eng. & Ir. App. 288.

(*k*) Bennet v. Davis, 2 P. Wms.

316.

(*l*) Fonb. Tr. Eq. 95; Co. Litt. by Butler, 351 a, n. See Creed v. Perry, 14 Sim. 592; Hall v. Hugonin, ibid. 595; In re Suggitt's Trusts, Law Rep., 3 Ch. App. 215.

(*m*) Fonb. Tr. Eq. 94.

seen, of making any conveyance or disposition of her property (*n*). Gifts of property, however, to the separate use of a married woman, are often accompanied with a clause in restraint of *anticipation*; that is, a proviso against her making any assignment of her interest, by way of anticipation of the income during the coverture: and such a proviso, (notwithstanding the general rule invalidating restrictions on alienation,) will be held effectual (*o*).

Provision being often made for married women by way of *marriage settlement*, and it being also of frequent occurrence between husband and wife to enter into an *arrangement for living separately*,—it will be desirable, before we conclude the present head, to take some notice of both these subjects. And—

1. With respect to *marriage settlements*.

Where a marriage is contemplated, and either party is possessed of considerable property, it is common for the intended husband to make a settlement out of it, for the benefit of the intended wife. This provision for her is very usually made by securing to her, through the medium of trustees, a rent-charge on his landed estate, during their joint lives (to be paid into her proper hands and to her separate use), for *pin-money*,—and also securing to her a further rent-charge for her life, in the event of her surviving her husband; which last allowance is by way of *jointure*, and is accepted in lieu of her dower (*p*). In return for this, if the intended wife possess a money portion, it is usually relinquished by her to the husband (*q*);

(*n*) Bac. Ab. Bar. & F. 507. The doctrine extends to her conveyance of such property by *devises*; see Taylor v. Mead, 34 Law Journ., Ch. 203. As to such property being liable to her *debts*, see Picard v. Hine, Law Rep., 5 Ch. App. 274.

(*o*) See Sockett v. Wray, 4 Bro. C. C. 483; Parkes v. White, 11 Ves.

221; Jackson v. Hobhouse, 2 Mer. 483; Woodmeston v. Walker, 2 Russ. & M. 197; Brown v. Pocock, ibid. 210; Harnett v. Macdougall, 8 Beav. 187.

(*p*) As to "pin-money," see Jodrell v. Jodrell, 9 Beav. 45. As to jointure, vide sup. vol. I. p. 272.

(*q*) Hayes, Conv. 249, n.

but if the amount be large, the return of a part of it, upon certain contingencies, to her kindred, is often secured by the settlement. If there be hereditary rank or a title to be supported, or it be in contemplation to found a family, the deed also usually contains provisions for entailing the bulk of the landed estate on the issue of the marriage; and this is commonly done by limiting it to the father for life, and, after his death, to the first and other sons successively in tail, and then to the daughters in tail.

A marriage settlement may be made either in contemplation of marriage, or after marriage has taken place. One of the former kind (or an ante-nuptial settlement) being made on what the law deems a valuable consideration, viz. the future marriage, cannot in the absence of fraud (*r*), be impeached even by those to whom the husband was indebted at the time; but is binding against all the world (*s*). A post-nuptial settlement, on the other hand, is in general considered as *voluntary* (*t*), that is, as having been made on no valuable consideration; and, if it relate to lands or tenements, it is consequently, by the effect of the statute 27 Eliz. c. 4, void as against subsequent purchasers for valuable consideration, whether they purchase with notice of the settlement or not,—the husband being allowed to defeat in this way his own previous gift (*u*). A post-nuptial settlement, whether relating to real or personal property, is moreover, by the effect of the statute 13 Eliz. c. 5, void as against all creditors to whom the husband was indebted at the time of the settlement, with-

(*r*) See *Barnard v. Ford*, Law Rep., 4 Ch. App. 247; *Spirett v. Willows*, ib. 407; *Ware v. Gardner*, ib., 7 Eq. Ca. 317; *Bulmer v. Hunter*, ib., 8 Eq. Ca. 46.

(*s*) See *Cadogan v. Kennett*, Cowp. 432; *Brown v. Jones*, 1 Atk. 190; *Campion v. Cotton*, 17 Ves. 272; *Hardey v. Green*, 12 Beav. 182. As to the jurisdiction of the new

Divorce Court in relation to marriage settlements, vide post, p. 282.

(*t*) *Baumont v. Thorpe*, 1 Ves. sen. 27. As to the supervision of the courts of equity over voluntary settlements *not* made in connection with marriage, see *Everitt v. Everitt*, Law Rep., 10 Eq. Ca. 405.

(*u*) See *Johnson v. Legard*, 6 Man. & Sel. 60.

out possessing adequate means of payment; and also as against subsequent creditors, if he made it with the fraudulent view of defeating their future claims (*y*). But as against all other persons, a settlement after marriage, though voluntary in its nature, is effectual: and there are instances in which it is deemed not voluntary, and therefore valid as against all the world; as in the case where it is executed in pursuance of a written agreement to that effect entered into before marriage (*z*), or as the condition of the husband's obtaining possession of property to which the wife was equitably entitled (*a*), or in consideration of an additional portion paid to him by her friends after the marriage (*b*). But the validity of voluntary settlements must sometimes also be considered in reference to the special provisions of the law of bankruptcy; and as to this the Bankruptcy Act of 1869 contains certain enactments as to settlements made by a trader, which have already been adverted to in a previous part of this volume (*c*).

2. With respect to *arrangements for separation*.

Although the law looks with great disfavour on any agreement the object of which is to relieve from the duties and obligations arising from the conjugal relation, yet where the husband and wife have actually come to a resolution to live separately, the courts, both of law and equity, have in many cases recognized the validity of agreements made for the purpose of carrying such a resolution into effect (*d*).

(*y*) See *Walker v. Burrows*, 1 Atk. 93; *Stileman v. Ashdown*, 2 Atk. 481; *Kidney v. Coussmaker*, 12 Ves. 156; *Holloway v. Millard*, 1 Madd. 421; *Shears v. Rogers*, 3 Barn. & Adol. 363.

(*z*) See *Doe d. Otley v. Manning*, 9 East, 59; *Doe v. Rowe*, 4 Bing. N. C. 737; *Brown v. Jones*, 1 Atk. 190.

(*a*) *Wheeler v. Caryl*, Amb. 121.

(*b*) See *Russell v. Hammond*, 1

Atk. 13; *Wheeler v. Caryl*, ubi sup.

(*c*) Vide sup. p. 170.

(*d*) See *Westmeath v. Westmeath*, Jae. Rep. 126; *Jee v. Thurlow*, 2 Barn. & Cress. 547; *Wilson v. Mushett*, 3 Barn. & Adol. 752; *Jones v. Waite*, 1 Bing. N. C. 656; *Gustom v. Nankum*, 2 De G. & Sm. 261; *Sanders v. Rodway*, 22 L. J. (C. C.) 230; *Kendal v. Webster*, 1 H. & Colt. 440.

This is usually done by the husband's covenanting with trustees appointed on behalf of the wife, that he will provide certain sums to be paid to them for her separate maintenance—the trustees covenanting in return with the husband to indemnify him against the debts of the wife, and that she shall release all claims for jointure and dower. The deed also contains, in general, clauses in which both the husband and the wife covenant with the trustees not to molest or interfere one with the other, and not to sue for the restitution of conjugal rights. Under such an agreement, the wife is entitled to receive her separate allowance, so long as the separation continues, and while she observes the covenants on her part, in the deed contained; and she does not forfeit that claim even by the commission of adultery (*e*).

It is to be observed, however, that though the law allows provision to be made for a separation already determined on, yet it will not sanction any agreement, the effect of which is to provide for the contingency of a future separation at the pleasure of the parties,—because this has a tendency to promote that event, contrary to the manifest policy of the law (*f*). It is also to be understood, that a married woman, though thus separated from her husband, is not thereby divested, as regards her position towards third parties or otherwise, of the condition of coverture (*g*).

III. We are next to consider the manner in which a marriage may be dissolved or declared to be a nullity. Dissolution may be either by death or divorce. Prior to the new Divorce Act, 20 & 21 Vict. c. 85, there were two kinds of divorce; the one *à mensû et thoro*,—the other *à vinculo matrimonii*. The first species, or separation from

(*e*) See *Jee v. Thurlow*, 2 Barn. & Cress. 547; *Baynon v. Batley*, 8 Bing. 256.

(*f*) See *Durant v. Titley*, 7 Price, 577; *Hindley v. Marquis of West-*

meath, 6 Barn. & Cress. 200; *Cocksedge v. Cocksedge*, 14 Sim. 244.

(*g*) *Marshall v. Rutton*, 8 T. R. 545.

bed and board, was pronounced by the Ecclesiastical Court in cases where there was no illegality in the union in the commencement, but where from some supervenient cause it had become improper for the parties to live together; as in the case of intolerable cruelty in the husband, adultery in either of the parties, a perpetual disease (*h*), or conviction for an unnatural offence (*i*). It would not be granted on the prayer of the husband on the ground of *adultery*, if the wife recriminated and proved that he also had been unfaithful to the marriage vow; or if it appeared that after knowledge of her adultery, he had cohabited with her or otherwise condoned her offence (*k*). The sentence for this divorce, though it effected a judicial separation, did not bastardize the issue of the marriage, or enable either of the parties to contract a fresh union. By its effect the wife, if the innocent party, generally became entitled to *alimony* (*l*); that is, an allowance for her support out of her husband's estate to an amount settled at the discretion of the judge on consideration of all the circumstances of the case, and usually proportioned to the rank and quality of the parties (*m*). But the law allowed no alimony to the wife, in case the divorce was obtained on the ground of her adultery, nor in case of her having from other sources a sufficient income without it (*n*).

As for the divorce *à vinculo*, this was a declaration by the Ecclesiastical Court that the marriage was a nullity as having been absolutely unlawful from the beginning. It consequently separated the parties *pro salute anima-*

(*h*) 1 Bl. Com. 441; 3 Bl. Com. 94. Blackstone refers also to "intolerable ill-temper," as another sufficient cause. But see *Evans v. Evans*, 1 Hagg. 36; Coleridge's Blackstone, vol. iii. p. 441, n. (*g*).

(*i*) 3 Bl. Com. 94, note by Christian.

(*k*) 1 Ought. 317; Burn, Eccl. Law, Marriage, xi.

(*l*) 1 Bl. Com. 441; 3 Bl. Com.

94. Blackstone remarks that this was sometimes called her *estovers*, for if the husband refused payment there was a suit at common law *de estoveriis habendis* to recover them.

(*m*) Bl. ubi sup. See 20 & 21 Vict. c. 85, s. 32 (amended by 29 Vict. c. 32), as to payments to the divorced wife.

(*n*) Bl. ubi sup. Cowel, tit. Alimony.

rum (*o*), bastardized the issue (*p*), and enabled the parties severally to contract another marriage at their pleasure (*q*). It was always founded on some *canonical* disability, and it could never be pronounced for any cause whatever supervenient to the marriage, not even for adultery itself (*r*). For the canon law regarded the nuptial tie as so sacred a one, that it would not allow it to be unloosed for any cause that arose after the union was made. And this is said to be built on the divine revealed law (*s*); though that expressly assigns incontinence as a cause (and indeed the only cause) why a man may put away his wife and marry another (*t*). But though divorce *à vinculo* for adultery could not, at this period, be obtained in the regular course of law, yet it was very frequently granted on that ground, by a private Act of Parliament; it having become the practice of the legislature to exercise its paramount authority in this manner, by way of extraordinary relief to a husband thus injured.

By the new Divorce Acts, however, this former state of the law has been lately subjected to changes of a fundamental and most important character (*u*). Not only has the jurisdiction of the Ecclesiastical Courts in causes matrimonial been taken from them and transferred to the new Court for Divorce and Matrimonial Causes (*x*), but

(*o*) 1 Bl. Com. 440.

(*p*) Ibid.; Co. Litt. 235.

(*q*) Moore, 666; Stephens *v.* Totty, Cro. Eliz. 908.

(*r*) 1 Bl. Com. 441; Moore, 683; Bac. Ab. Marriage, E. 3. *Antiently*, however, adultery was held cause for divorce *à vinculo*. (3 Salk. 138.) But the law was otherwise settled in Foljamb's case, 44 Eliz. in the Star Chamber.

(*s*) See Matt. xix. 9.

(*t*) Bl. Com. ubi sup.

(*u*) Some interesting remarks on the effect of the new law in con-

nexion with that which previously obtained on the subject of the contract of marriage will be found in the judgment of Sir W. P. Wood, in the case of Wilkinson *v.* Gibson, Law Rep., 4 Eq. Ca. 162.

(*x*) 20 & 21 Viet. c. 85, ss. 2, 6. As to applications for *restitution of conjugal rights* in the new court (as to which restitution, vide sup. p. 238, n.), see Hayward *v.* Hayward, 1 Swab. & Trist. 81; Hope *v.* Hope, ib. 94; Cherry *v.* Cherry, ib. 319; Yelverton *v.* Yelverton, ib. 574.

many novel provisions have been introduced into this branch of the law: the main effect of which may be summarily stated as follows. The Acts provide (*z*),—

1. That, in lieu of the divorce *à mensâ et thoro*, the new Court may decree, on the petition either of husband or wife, a *judicial separation*; which shall have all the effect that belonged to the divorce just mentioned (*a*);—that this judicial separation may be decreed on the ground of adultery, or cruelty, or desertion without cause for two years and upwards (*b*);—and that, during its continuance, the wife shall acquire as to property, and for many other purposes, the condition of a *feme sole* (*c*).

2. That a *divorce* (or *dissolution of marriage*) may also be obtained from the new Court, on the petition of either husband or wife (*d*). Where *he* is petitioner, it may be upon the ground that since the marriage she has been guilty of adultery (*e*). Where the petition is on *her* part, it may be on the ground that he has since the marriage been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or unnatural crime; or of adultery coupled with such cruelty as would, without adultery, have entitled her to a divorce *à mensâ et thoro*; or of adultery coupled with desertion, without reasonable excuse, for two years or upwards (*f*). But the Court cannot decree the divorce, if the petitioner has been accessory to, or connived at, or has condoned the adultery; or if the petition is presented or prosecuted by collusion (*g*): and is not *bound*

(*z*) Rules and Regulations for the procedure in this Court were promulgated by the Judge Ordinary on the 26th December, 1865.

(*a*) 20 & 21 Vict. c. 85, s. 7.

(*b*) Sect. 16. See Tomkins *v.* Tomkins, 1 Swab. & Trist. 168.

(*c*) Sect. 25.

(*d*) If the court has no jurisdiction in the special case, a private Act is the only remedy. An in-

stance of such an Act is the 30 & 31 Vict. c. x.

(*e*) 20 & 21 Vict. c. 85, s. 27. The husband may also proceed by petition against the adulterer for *damages*, *ib.* s. 33. (See Bell *v.* Bell, 1 Swab. & Trist. 565.)

(*f*) Sect. 27.

(*g*) Sects. 30, 31. As to the intervention of the Queen's Proctor in cases of collusion, see Conradi *r.*

to decree the divorce, if the petitioner has been guilty of adultery during the marriage; or of unreasonable delay in the petition; or of cruelty to the other party; or of desertion or wilful separation from the other party, before the adultery, and without reasonable excuse: or of such wilful neglect or misconduct as has conduced to the adultery (*h*).

3. That every decree for a divorce shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the Court shall by general or special order from time to time direct (*i*). And that, during such period, any person may show cause why the decree should not be made absolute, either by reason of collusion or of some material facts not having been brought before the Court: and on cause being so shown, the Court shall deal with the case by making the decree absolute; or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require (*k*).

4. That on a decree for dissolution of marriage, there may be an appeal within one calendar month (*l*); and when the marriage is finally declared to be dissolved, it shall be lawful for either party to marry again, as if the prior or alleged marriage had been dissolved by death (*m*).

5. That on a decree for judicial separation, (on the wife's petition,) or on a decree for dissolution of a marriage,

Conradi and Way, Law Rep., 1 P. & D. 391.

(*h*) 20 & 21 Vict. c. 85, s. 31. See *Cunnington v. Cunningham*, 1 Swab. & Trist. 475; *Baylis v. Baylis*, Law Rep., 1 P. & D. 391.

(*i*) See 29 Vict. c. 32, s. 3.

(*k*) 23 & 24 Vict. c. 144, s. 7.

(*l*) 31 & 32 Vict. c. 77, s. 3. The right of appeal was extended by 22 & 23 Vict. c. 61, s. 7, to sentences and final judgments under

the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), as to which, vide sup. p. 239. The appeal given by the above statutes is to the *House of Lords*; but after the commencement of the Judicature Act, 1873 (36 & 37 Vict. c. 66), on the 2nd November, 1874, the only appeal will be to the Court of Appeal by that Act established.

(*m*) 20 & 21 Vict. c. 85, s. 57.

an order may be made for alimony to the wife (*n*), and with regard to the custody, maintenance, and education of the children (*o*). And that on a decree of divorce or judicial separation for adultery of a wife entitled to any property, an order may be made with regard to a settlement thereout for the innocent party and children of the marriage (*p*).

6. That the Court, after a final decree for dissolution of a marriage, may inquire into the existence of any antenuptial or post-nuptial settlements, made on the parties whose marriage is the subject of the decree; and may make such orders with reference to the application of the whole or a portion of the property settled,—either for the benefit of the children of the marriage, or of their respective parents,—as to the Court shall seem fit (*q*).

7. That a decree of *nullity of marriage* (enabling the parties to marry) may also be obtained from the new Court on any ground which would have formerly justified such a decree, and a divorce *à vinculo* consequent thereon, from the Ecclesiastical Court (*r*).

(*n*) 20 & 21 Vict. c. 85, ss. 17, 32. See *Saunders v. Saunders*, 1 Swab. & Trist. 72; *Ex parte Holden*, 13 C. B. (N. S.) 641; *Sidney v. Sidney*, Law Rep., 1 P. & D. 78; *Louis v. Louis*, ib. 230.

(*o*) 22 & 23 Vict. c. 61, s. 4. Orders as to the custody, &c. of the children, may also be made on a decree of *nullity* of marriage. (Ibid.)

(*p*) 20 & 21 Vict. c. 85, s. 45; 23 & 24 Vict. c. 144, s. 6.

(*q*) 22 & 23 Vict. c. 61, s. 5. Orders as to property so settled may also be made after a decree of *nullity* of marriage. (Ibid.) On the

construction of this section, consult *Chetwynd v. Chetwynd*, Law Rep., 1 P. & D. 39; *Bird v. Bird*, ib. 231; *Pratt v. Jenner*, ib., 1 Ch. Ap. 493.

(*r*) 20 & 21 Vict. c. 85, ss. 6, 10, 22, 35, 41. The provision as to an appeal, mentioned sup. p. 281, applies whether the decree be for a *dissolution*, or for a *nullity*. See also 36 Vict. c. 31, an Act to extend to suits for *nullity of marriage*, the law with respect to the intervention of her Majesty's proctor and others in suits in England for dissolving marriages.

CHAPTER III.

OF PARENT AND CHILD.

THE next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.

Children are of two sorts, legitimate,—and illegitimate or bastards;—which will lead us to consider, First, the law of legitimacy,—Secondly, the reciprocal duties and rights between parents and their legitimate offspring,—And, Lastly, the rights and incapacities of bastards.

I. A legitimate child is one born of wedlock; or (more particularly) one between whose parents the relation of marriage subsisted either at the time when he was begotten, or at the time when he was born, or at some intervening period: and all persons otherwise circumstanced are, by the laws of England, bastards (*a*). For a child begotten of parents married at the time, or married afterwards, (but before he was born,) is legitimate, though in consequence of the death of one of them, or their divorce, the marriage was dissolved before he was born. And the case is the same with one born of parents married at the time of his birth, though they were unmarried when he was begotten. But where the issue is begotten before

(*a*) See Co. Litt. 7 b, 244 a; 1 Bl. Com. 446; R. v. Luffe, 8 East, 193, and Doe *d.* Burtwhistle v. Vardill (in Dom. Proc.), 6 Bing. N. C. 385. See also 21 & 22 Vict. c. 93, passed

to enable persons to establish legitimacy (as to which Act, vide sup. p. 239). As to the derivation of the term *bastard*, see Co. Litt. by Butler, 243 b, n. (2).

the marriage of his parents, our law makes it an indispensable condition to its legitimacy, that they should intermarry at some period before its birth (*b*). In this last point the civil and canon laws differ materially from ours; for, according to them, it is sufficient to render the issue legitimate, that the parents should intermarry after the birth (*c*). [But the reason of our English law is surely much superior to that of the Roman, it being one main end of marriage to ascertain some person to whom the care, the maintenance and the education of the children should belong; and this end is undoubtedly better answered by legitimating, as with us, all issue born after wedlock, than by legitimating, as in that law, all issue of the same parties even born before wedlock, so as wedlock afterwards ensues. 1. Because of the very great uncertainty there will generally be, under the Roman law, in the proof, that the issue was really begotten by the same man who afterwards becomes husband; whereas by confining the proof to the birth during marriage, our law has rendered it much more certain what child is legitimate and who is to be responsible for its care. 2. Because by the Roman law, a child by a marriage *ex post facto*, may be continued a bastard, or made legitimate, at the option of the father and mother, thereby opening a door to many partialities, which by our law are prevented. 3. Because this rule of the Roman law, is evidently a great encouragement to unlawful cohabitation; particularly as

(*b*) From the remotest period of its history, our law has considered an *ante-natus* as illegitimate. (See *Doe v. Burtwhistle v. Vardill*, 6 Bing. N. C. 385.) And it has been further decided, that even where born in a foreign country the law of which allows an *ante-natus* to be legitimated, he is nevertheless incapable of inheriting to land in England. (*Ibid.*)

(*c*) Co. Litt. by Butler, 245 a, n. (1), where further information will be found on this subject. The doctrine of legitimacy by a subsequent marriage, is said to have been established in the civil law by Constantine, and confirmed by Justinian; and to have been established in the canon law by a constitution of Pope Alexander the Third, in 1160. (*Ibid.*)

[it admits of no limitation as to the time or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial estate, to which one main inducement is usually not only the desire of having *children*, but also the desire of procreating lawful *heirs*; whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten, in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten as well as born within the rules of honour and civil society. Upon reasons like these, we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate (*d*).]

What has been hitherto said supposes, it will be observed, the true parentage in each case to be established; but that is a point which, even as regards the ostensible issue of married persons, the law permits to be brought into controversy. As if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, her issue

(*d*) "*Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt, quod nolunt leges*

Angliæ mutare quæ huc usque usitatae sunt et approbatæ."—Stat. 20 Hen. 3, c. 9. See the Introduction to the Great Charter, edit. Oxon. 1759, sub anno 1253; also the remarks upon this statute in Doe *d*. Burtwhistle v. Vardill, 6 Bing. N. C. 385.

during that period shall be bastards (*e*). And children born during marriage may be also proved bastards by other cogent evidence; as by proof of the impotency of the husband; or that the husband and wife had no opportunity—though both within the realm—of sexual intercourse within such period as is consistent with their being the parents (*f*); or even by proof of circumstances tending strongly to the inference that no such intercourse (supposing it to be possible) in fact took place (*g*). So it was held, while divorces *à mensâ et thoro* and *à vinculo* were adjudged by the Courts Ecclesiastical, that, if the wife bred children during the former kind of divorce, they were *primâ facie* bastards; for the law presumed the parties to live conformably to the sentence: and that, after a divorce *à vinculo* had been adjudged, all the children were necessarily to be deemed bastards; because such sentence was always on the ground of the nullity of the marriage *ab initio* (*h*). But except where a divorce has taken place between the married parties, or evidence has been given of facts sufficient to disprove their sexual intercourse, the law has always presumed in favour of the legitimacy of a child born to the wife during the marriage (*i*). Upon the same principle, too, legitimacy will always be presumed (subject to the same exceptions), with respect to children born after the coverture has ceased by reason of the husband's death,—unless the birth takes place so long afterwards that the child clearly could not

(*e*) 1 Bl. Com. 457; Co. Litt. 244.

(*f*) Lord Coke lays it down that the legitimacy is not capable of being disputed if the father was within the four seas. (Co. Litt. 244 a.) But the law is now otherwise settled.

(*g*) See *R. v. Lubbenham*, 4 T. R. 251; *Goodright v. Saul*, *ibid.* 356; *R. v. Luffe*, 8 East, 193; *Le Marchant's Report of the Cases of*

the Banbury Peerage and Gardner Peerage, and the authorities there cited. See also *Morris v. Davies*, 5 Cl. & Fin. 163.

(*h*) 7 Rep. 42; 3 P. Wms. 275; 1 Salk. 123.

(*i*) Bl. Com. *ubi sup.* See *Goodright v. Saul*, *ubi sup.*; *R. v. Mansfield*, 1 Q. B. 449; *Saye & Sele Peerage*, 1 H. of L. Cas. 507; *Hargrave v. Hargrave*, 9 Beav. 552.

be begotten by him. And what shall be considered as the *ultimum tempus pariendi*, or the extreme period between the conception and the birth, is a point that the law has not exactly determined, but leaves, as a matter of fact, in each particular case, to the decision of a jury; who are to judge of it according to the circumstances, and the testimony which persons of experience may give of the course of nature on this subject (*j*).

[In connection with this matter, we may notice a proceeding in our antient law (of which there have been instances also in modern times) applicable to the case where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate; an attempt which the rigour of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death (*k*). In this case, with us, the heir presumptive may have a writ *de ventre inspiciendo*, to examine whether she be with child or not, and if she be, to keep her under proper restraint till delivered (*l*); which is entirely conformable to the practice of the civil law (*m*): but if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again on the birth of a child within forty weeks from the death of a husband (*n*). But if a man dies and his widow soon after marries again, and a child is born within such a time as that by the course of nature it might have been the child of either husband, in this case he is said to be more than ordinarily

(*j*) Lord Coke lays it down as a positive rule, that the extreme period is nine calendar months, or forty weeks. (Co. Litt. 123 b.) But though that limit is seldom exceeded, the law considers it as subject to possible extension. See 1 Bl. Com. 457; Co. Litt. by Harg. 123 b, n. (1); *Alsop v. Bowtrell*, Cro. Jac. 541; *Case of the Gardner*

Peerage.

(*k*) Stiernh. De Jure Goth. l. 3, c. 5.

(*l*) Bract. l. 2, c. 32; Aiscough's case, 2 P. Wms. 591; *Ex parte Wallop*, 4 Bro. C. C. 90; Co. Litt. by Harg. 8 b, and n. (3); *ibid.* 123 b, n. (1).

(*m*) Ff. 25, tit. 4, per tot.

(*n*) Britton, c. 66,

[legitimate; and it is said, that he may, when he arrives to years of discretion, choose which of the fathers he pleases (*o*). To prevent this, among other inconveniences, the civil law ordained that no widow should marry *intra annum luctus* (*p*); a rule which obtained so early as the reign of Augustus, if not of Romulus (*q*): and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in the island; for we find it established under the Saxon and Danish governments (*r*).

II. Having thus explained to what children the epithet of legitimate applies, we are next to consider the duties of parents towards, and their power over, such children; and the reciprocal duties of the children towards their parents.

1. And first, the duties of the parents: which principally consist in three particulars; the maintenance of the children, their protection, and their education.

The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation, says Puffendorf (*s*), laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents. And the pre-

(*o*) Co. Litt. 8 a; but this doctrine has been questioned. Ibid. n. (7), by Harg.

(*p*) Cod. 5, 9, 2.

(*q*) But the Roman year, as established by Romulus, only con-

sisted of ten months. Ov. Fast. l. 27.

(*r*) "*Sit omnis vidua sine marito duodecim menses.*"—Wilk. Leg. Anglo-Sax. Ll. Ethel. A.D. 1008; Ll. Canut. c. 71.

(*s*) L. of N. l. 4, c. 11.

[sident Montesquieu has a very just observation upon this head (*t*): that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfil this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way,—shame, remorse, the constraint of her sex, and the rigour of laws,—that stifle her inclinations to perform this duty; and besides, she generally wants ability.

The municipal laws of all well-regulated states have taken care to enforce this duty: though Providence has done it more effectually than any laws, by implanting in the breast of every parent that natural *στοργή*, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

The Roman civil law, in particular, obliges the parent to provide maintenance for his child; and if he refuses, “*judex de eâ re cognoscet*” (*u*). Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so doing; and there are fourteen such reasons reckoned up, which may justify such disinherison (*x*). If the parent alleged no reason, or a bad, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty of the parent. And it is remarkable under what colour the children were to move for relief in such a case: namely, by suggesting that the parent had lost the use of his reason, when he made the inofficious testament. And this, as Puffendorf observes (*y*), was not to bring into dispute the testator’s power of disinheriting his own offspring, but to examine the motives upon which he did it; and if they were found defective in reason, then to set them aside. But perhaps this is going rather

(*t*) Sp. L. b. 23, c. 2.

(*x*) Nov. 115.

(*u*) Ff. 25, 3, 5.

(*y*) L. 4, c. 11, s. 7.

[too far; as every man has, or ought to have, by the laws of society, a power over his own property; and, as Grotius very well distinguishes, natural right obliges to give a *necessary* maintenance to children; but what is more than that, they have no other right to than as it is given them by the favour of their parents, or the positive constitutions of the municipal law (z).]

Let us next see what provision our own laws have made on this subject. However plain the moral obligation, that every man shall provide for those descended from his loins, it is one which our law seems to have given no direct means of enforcing, perhaps because its neglect was considered as an improbable case (a). But very slight circumstances will be sufficient to raise, in a court of law, on action brought, the presumption of a contract on the part of the father to pay for necessaries provided to his infant child (b). And the statute law, among its other provisions relating to the poor, has made it compulsory upon all parents, whose circumstances enable them to do so, to provide a maintenance for their children, when in poverty, of whatever age they may be; and indeed whenever, through infancy, disease, or accident, they are unable to support themselves (c). The manner in which this obligation shall be performed is thus pointed out by the legislature (d). The father and mother, grandfather and grandmother, of any poor person not able to work, shall maintain him or her at their own charges, if of sufficient ability, according as the quarter sessions, or two justices in petty sessions, shall direct; and if a parent *runs away* and leaves his children chargeable to a parish, the churchwardens and overseers

(z) De J. B. et P. l. 2, c. 7, n. 3.

(a) See *Urmston v. Newcomen*, 4 Ad. & L. 899; *Queen v. Hogan*, 20 L. J. (M. C.) 219.

(b) See *Law v. Wilkin*, 6 Ad. & El. 718; *Bazeley v. Forder*, Law Rep., 3 Q. B. 559.

(c) By the Married Women's

Property Act, 1870, this liability to support their children has been extended to married women having separate property. (33 & 34 Vict. c. 93, s. 14.)

(d) See 43 Eliz. c. 2; 5 Geo. 1, c. 8, and 59 Geo. 3, c. 12, s. 26.

shall, upon obtaining an order of magistrates for the purpose, seize his rents, goods, and chattels, and dispose of them towards the required relief (*e*). Moreover, the parent himself, in such case, may be committed to hard labour under the Vagrant Act (*f*); as he may also be, if, though able, he shall wilfully *refuse* or *neglect* to maintain his family, whereby they become chargeable (*g*). Also all relief given under the poor laws to any child or children under the age of sixteen, (not being blind, or deaf and dumb,) shall be considered as given to the father, or (if he is dead) to his widow (*h*). And every person is made liable to maintain his wife's children born before his marriage to her, (whether legitimate or illegitimate,) as part of his family; and shall be chargeable with all relief granted to them under the poor laws, until they attain the age of sixteen, or until the death of the mother (*i*). Again, by recent statutes (*k*), in any case in which any child is detained in a certified "reformatory" or "industrial" school, the parent, or step-parent, or other person liable for his maintenance, shall, if of sufficient ability, contribute to his support, maintenance and training therein, a sum not exceeding five shillings a week.

[No person, however, is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them in necessities (*l*). For the policy of our laws, which are ever

(*e*) See 4 & 5 Will. 4, c. 76, s. 78.

As to orders of maintenance, on the relations of a chargeable pauper, see also 11 & 12 Vict. c. 110, s. 8.

(*f*) See 5 Geo. 4, c. 83, s. 24; *Nixon v. Nanny*, 1 Q. B. 747.

(*g*) 5 Geo. 4, c. 83, s. 3. See also 31 & 32 Vict. c. 122, s. 37, in furtherance of this duty and providing additional penalties for its neglect.

(*h*) 4 & 5 Will. 4, c. 76, ss. 56, 57.

(*i*) See *Queen v. Inhabitants of Shavington-cum-Gresty*, 17 Q. B. 48.

(*k*) These are, 29 & 30 Vict. cc. 117, 118. Vide post, bk. IV. pt. III. c. IV.

(*l*) By 11 & 12 Will. 3, c. 4, if a Popish parent refused to allow his Protestant child a fitting maintenance, with a view to compel him

[watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence; and thought it unjust to oblige the parent, against his will, to provide them with superfluities and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours.

It has been before observed (*m*), that our present law (setting aside the antient right of the children to the *pars rationabilis*) has made no provision to prevent the disinheriting of children by will; leaving every man's property at his own disposal, upon a principle of liberty in this, as well as every other action; though perhaps it had not been amiss if the parent had been bound to leave them at the least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage articles.

From the duty of maintenance we may easily pass to that of protection, which is also a natural duty, but rather permitted than enjoined by any municipal laws; nature, in this respect, working so strongly as to need rather a check than a spur. It is, however, distinctly recognized in the English jurisprudence; it being laid down that a parent may maintain and uphold his children in their lawsuits, without being guilty of the legal offence of maintaining quarrels (*n*): and he may also justify an assault and battery in defence of their persons (*o*).

The last duty of parents to their children, is that of giving them an education suitable to their station in life:

to change his religion, the lord chancellor might, by order of the court, compel him to do what was just and reasonable. And by 1 Ann. st. 1, c. 30, if a Jewish parent refused to allow his Protestant children a fitting maintenance, suitable to the fortune of the parent, a similar re-

medy was provided. But both these statutes are now repealed by 9 & 10 Vict. c. 59.

(*m*) Vide sup. pp. 179, 181.

(*n*) 2 Inst. 564. Vide post, bk. VI. ch. IX. vol. IV.

(*o*) 1 Hawk. P. C. 131.

[a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes(*p*), it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education; and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself.] Yet prior to the year 1870, no provisions were to be found in the law of England compelling a parent to educate his child; but in that year “An Act to provide for Public Elementary Education in England and Wales” (33 & 34 Viet. c. 75) was passed in order to supply this deficiency. Of this it will be sufficient to say, here, that parents may now be compelled, in the absence of reasonable excuse, to cause their children between the ages of five and thirteen to attend one of the schools under the provisions of that Act (*q*).

2. [The power of parents over their children is derived from their duty towards them: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompence for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents, than we find in others. The antient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave, had also the power of taking away(*r*). But the rigour of these laws was softened by subsequent constitutions; so that we find a father banished by the Emperor Hadrian for killing his son, though he had committed a very heinous crime; upon this maxim, that “*patria potestas in pietate debet, non in atrocitate, consistere*”(s). But still they maintained to the last a very large and

(*p*) L. of N. b. 6, c. 2, s. 12.

bk. IV. pt. III. ch. IV.

(*q*) Some further account of this Act, and of those by which it has been amended, will be found post,

(*r*) Ff. 28, 2, 11; Cod. 8, 47, 10.

(*s*) Ff. 48, 9, 5.

[absolute authority; for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life (*t*).

The power of a parent by our English laws, though much more moderate, is still sufficient to keep the child in order and obedience; and it is laid down that a father may lawfully correct him, being under age, in a reasonable manner; for this is for the benefit of his education (*u*). He may also delegate part of his parental authority to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed (*w*).] Moreover, a father, generally speaking, is guardian to the property of his infant child, and if such child has any real estate, is entitled to take charge of it in that capacity, and receive the rents and profits during the minority subject to the liability to account for them on his child's attaining his full age. The father is also entitled to the control of the person of his child (*x*); so that if the possession be withheld from him, he may in general regain it by writ of *habeas corpus* (*y*). Besides which, the right of the father, mother, or other guardian, to the possession of their children is protected in some measure by the provisions of the criminal law. For by 24 & 25 Vict. c. 100, s. 56, whosoever shall unlawfully, either by force or fraud, take or entice away, or detain any child under the age of *fourteen*, with intent to deprive its parent, guardian, or other person, having

(*t*) Inst. lib. ii. tit. 9, 1.

(*u*) 1 Hawk. P. C. 130.

(*w*) 1 Bl. Com. 461.

(*x*) Bl. Com. ubi sup. It is otherwise where the father is grossly unfit for the charge, and the child has property so as to fall within the

jurisdiction of the Court of Chancery. Vide post, p. 314.

(*y*) See Murray's case, 5 East, 223; Earl of Westmeath's case, Jacob, 251; Ex parte M'Clellan, 1 Dowl. 81; Re Hakewill, 12 C. B. 223; Ex parte Witte, 13 C. B. 680; Ex parte Allen, 9 W. R., Q. B. 99.

lawful charge of the child, of the possession thereof, (or shall, with such intent, receive or harbour any such child, knowing the same to have been so taken or detained,) shall be guilty of felony, and liable to penal servitude for seven years, or two years' imprisonment (*z*): and by the same Act (sect. 55), whosoever shall unlawfully take, or cause to be taken, any *unmarried girl*, under the age of *sixteen*, out of the possession and against the will of her father or mother, or other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and liable to the same term of imprisonment. Moreover, the assent of the father to the marriage of his child, if under age, is also required,—as was explained at large in the previous chapter (*a*). [But the legal power of a father over the persons or property of his children, extends not in any case beyond the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or the point which the law has established, (as some must necessarily be established,) when the empire of the father, or other guardian, gives place to the empire of reason. Yet till that age arrives, or till their marriage (which is another species of emancipation), this empire of the father continues even after his death; for he may by his will appoint a guardian to such of his unmarried children as are infants (*b*).]

With respect to the mother, she has no legal power over the child in the father's lifetime, (at least as against him,) except that, by the 2 & 3 Vict. c. 54 (*c*), where the child is within the age of nurture—that is, *seven* years,—the Lord Chancellor or Master of the Rolls may, upon the mother's petition, (unless she has been adjudged an adulteress,) make an order that it be delivered into her custody. But after the father's death she is entitled, as it

(*z*) This provision applies also where the intent is to *steal* any article from the child's person.

(*a*) Vide sup. pp. 248, 252.

(*b*) 12 Car. 2, c. 24.

(*c*) This statute is sometimes called "Talfourd's Act." See *The Queen v. Clarke*, 7 Ell. & Bl. p. 192.

seems, to the custody of the infant until twenty-one; and by the Marriage Acts, where there is no other guardian appointed, the widow, while she remains unmarried, stands in the father's place, after his death, as to the consent required to the child's marriage during minority. She cannot, however, appoint a guardian by will, as she is not mentioned in the statute of Charles the second, by virtue of which the father enjoys that privilege (*d*).

3. [The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all those duties of children to their parents, which are enjoined by positive laws. In this country, the law has not deemed it necessary to make much provision on the subject of the filial obligations. But it is held that a child is justified in defending the person and maintaining the cause or suit of a parent, as a parent is justified in performing the same duties for a child (*e*).] And by the statutes relating to the poor, the children of any old, blind, lame, impotent, or other poor person not able to work, shall, if of sufficient ability, at their own charges relieve and maintain him or her, in the manner and according to the rate which the justices of the peace at their quarter sessions shall direct (*f*).

III. We are next to consider the case of illegitimate children or bastards. The duty of parents to their bastard

(*d*) Vaughan, 180; Ex parte Edwards, 3 Atk. 519. The Court of Chancery, however, will regard her wishes on this head with great attention, where no guardian has been

selected by the father. See In re Kaye, Law Rep., 1 Ch. App. 387.

(*e*) 1 Bl. Com. 454.

(*f*) Vide post, bk. IV. pt. III. ch. II.

children is, by our law, principally that of maintenance. [For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature are not so easily dissolved; and the support of the offspring by the parent is, for reasons already noticed, a matter of natural obligation. The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances, was neither consonant to nature nor reason; however profligate and wicked the parents might justly be esteemed (*g*).]

The method in which the English law provides maintenance for an illegitimate child during its infancy is as follows. The mother is entitled to its custody (as it would seem) in preference to its putative father (*h*); and is bound to maintain it as part of her family, while she remains unmarried, or until the child attains the age of sixteen, or gains a settlement in its own right, or (being a female) is married (*i*); and in the event of the mother's marriage, the same liability attaches to her husband (*j*). If the mother be of sufficient ability to maintain the bastard, while so dependent upon her, and neglects that duty, so that her child becomes chargeable to a parish, she is liable, by 7 & 8 Vict. c. 101, s. 6, to be punished under the provisions of the Vagrant Act, 5 Geo. IV. c. 83. If, on the other hand, the mother be not of sufficient ability, the law affords her the means of compelling the putative father to supply a fund for its maintenance (*k*). For by 7 & 8 Vict.

(*g*) See Nov. 89, c. 15.

(*h*) See *R. v. Hopkins*, 7 East, 579; *Ex parte Anne Knee*, 1 Bos. & P. (N. S.) 148; *In re Hakewill*, 12 C. B. 231.

(*i*) 4 & 5 Will. 4, c. 76, ss. 57, 71; 2 & 3 Vict. c. 85; *Laing v. Spicer*, 1 Tyr. & Gran. 358; *R. v. Wendron*, 7 Ad. & Ell. 819.

(*j*) 4 & 5 Will. 4, c. 76, ss. 57, 78. But it does not attach to the administrator of her estate after

death. (*Ruttinger v. Temple*, 4 B. & Smith, 491.)

(*k*) The following are among the more recent cases on the subject of filiation and maintenance in bastardy:—*Queen v. Shipperbottom*, 10 Q. B. 514; *Queen v. Whittles*, 13 Q. B. 248; *Queen v. Justices of Leicestershire*, 15 Q. B. 88; *Kendall v. Wilkinson*, 4 Ell. & Bl. 680; *Potts v. Cambridge*, 8 Ell. & Bl. 847; *Hodges, app. v. Bennett*, resp.

c. 101, as amended by the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), a single woman may, either before the birth of her bastard child, or at any time within twelve months afterwards, make application to a justice of the peace, charging a person by name as the father of such child (*l*); and where the alleged father has within twelve months next after its birth paid money for the maintenance of the child, such application may be made at any subsequent period whatever without limitation in regard to time (*m*). Upon this, the justice issues his summons to the party charged to appear at a petty session, whereat the evidence on both sides is heard (*n*). And if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the justices at such session, the man may be adjudged thereat to be the putative father of the child in question (*o*); and the justices may also (if they see fit under the circumstances) make an order on him for the payment to the mother—or to some other person to be appointed for the custody of the child in the case of her death, insanity, or imprisonment—of a weekly sum of money for its maintenance and education; and such order shall be in force until the child shall die or shall attain the age of thirteen, or (if the justices shall so direct) the age of sixteen (*p*). The party charged, however, is entitled to appeal from this order to the quarter sessions, upon enter-

5 H. & N. 625; *The Queen v. Pickford*, 1 B. & Smith, 77; *Follit v. Koetzow*, 2 Ell. & Ell. 730; *The Queen v. Gaunt*, Law Rep., 2 Q. B. 466; *Marshall, app. v. Murgatroyd*, resp., ib., 6 Q. B. 31.

(*l*) By 35 & 36 Vict. c. 65, some of the previous enactments on this subject contained in 7 & 8 Vict. c. 101, are repealed. The Act last named was also amended by 8 & 9 Vict. c. 10.

(*m*) 35 & 36 Vict. c. 65, s. 3. If the alleged father can be shown to

have ceased to reside in England within the twelve months following the birth, then the application may be made at any time within the twelvemonth next after his return to England. (*Ib.*)

(*n*) In cases arising within the metropolitan police district, a *single* magistrate may act. (8 & 9 Vict. c. 10, s. 9.)

(*o*) See *The Queen v. Damerell*, Law Rep., 3 Q. B. 50.

(*p*) 35 & 36 Vict. c. 65, s. 5.

ing into recognizance to try the appeal and pay such costs as shall be adjudged thereon; and, before the latter jurisdiction, the case is then to be tried *de novo*, in the manner already stated in regard to the proceedings before the justices in petty session (*g*).

Though maintenance is thus provided for bastards during the period of childhood, they labour, on the other hand, under several incapacities and disadvantages; all of which are founded on the general doctrine, that a bastard is, for legal purposes, *filius nullius*, or, as it is sometimes expressed, *filius populi* (*r*). He is therefore not entitled by his birth to the name either of his mother or to that of his reputed father(*s*); nor can he take property by the mere description of *child* of his reputed parent, until he has acquired the reputation of standing in that relation to him (*t*). So, with respect to the acquisition of property *jure sanguinis*, he is in a different position from others—for he can neither be heir to any one, nor have an heir, the issue of his own body excepted—because being *nullius filius*, he has no ancestor from whom inheritable blood can be derived, and no collateral relations. If therefore he purchase land, though he may take in fee, so far as the power of alienation in fee to others is concerned, it is not, while it remains in his own seisin, a fee in the sense of being descendible to heirs generally, but its descent is confined to the heirs of his own body (*u*). And if he die seised of such estate without having devised it, and without lawful

(*g*) See 35 & 36 Viet. c. 65, s. 9. Where a bastard child has become chargeable to a union or parish, the application against his putative father may be made by the guardians instead of the mother. (Sect. 8.)

(*r*) Fortesc. de Leg. c. 4.

(*s*) Co. Litt. 3 b; Wilkinson v. Adam, 1 Ves. & B. 452.

(*t*) It may be worth while here incidentally to remark that *repu-*

tation appears to be the true title to surnames, even for those who are legitimate. Hence a man may acquire a fresh surname in a variety of ways, as, for example, by obtaining the *licence of the crown* for that purpose, or even by advertisement in the public papers and habitual use. (See *Doe dem. Lushcomb v. Yates*, 5 Barn. & Ald. 544.)

(*u*) Ld. Raym. 1152; 1 Prest. Est. 468.

issue, it will escheat to the crown, or other lord of the fee (*x*). And upon the same principle, he cannot claim any share of personal estate as next of kin to a party dying intestate; and if he himself die intestate, and without wife or lawful issue, the crown is entitled to the beneficial administration of the personal estate (*y*). But the royal claim to the real or personal estate of a bastard under such circumstances is not strictly enforced; and upon a proper petition, the crown's right will in general be transferred to the nearest member of his reputed family (*z*). There are some other points also, as to which a bastard is peculiarly circumstanced. Thus he does not follow (as legitimate children do) his father's place of parochial settlement under the laws relating to the poor, but his primary settlement (*i.e.* if born antecedently to 14th August, 1834,) is in the parish where he was born (*a*); and if born after that date,—that is, after the passing of the Poor Law Amendment Act, 4 & 5 Will. IV. c. 76,—then he has and follows the settlement of his mother till he attains the age of sixteen, or shall acquire a settlement for himself (*b*). Again, to authorize his marriage under twenty-one, the consent of his father or mother is not required, and is of no avail (*c*); but a guardian may be appointed by the Court of Chancery for the purpose, or a licence may be granted upon oath made that there is no person authorized to give consent (*d*). And to this we may add, that though in general a father may by deed or will appoint a guardian for his infant child, in the event of his decease, he has no such privilege if the child be illegitimate (*e*). On the other hand, the laws relative to incest, and to marriages within the pro-

(*x*) Vide sup. vol. 1. p. 440.

(*y*) *Megit v. Johnson*, Doug. 542; Toller, Ex. 107. See 47 Geo. 3, st. 2, c. 24, enlarging the powers of the crown to abandon its rights in the ease of escheated estates.

(*z*) *Megit v. Johnson*, ubi sup.,

Toller, ubi sup.

(*a*) Hard's case, Salk. 427.

(*b*) 4 & 5 Will. 4, c. 76, s. 71.

(*c*) *Priestley v. Hughes*, 11 East, 1.

(*d*) 4 Geo. 4, c. 76, s. 14; 6 & 7 Will. 4, c. 85, s. 12.

(*e*) Vide post, p. 311.

hibited degrees of consanguinity or affinity, apply to a bastard with equal force as to those who are born in wedlock, the principle of his being *nullius filius* having no effect in these particulars (*f*). And it may be stated generally, that, except in the several points above enumerated, the legal position of a bastard is the same with that of another man. He is capable, too, of being, by the transcendent power of an act of parliament, made legitimate to all purposes, even that of inheriting land: as was done by a statute of Richard II. in the case of John of Gaunt's bastard children.

(*f*) 3 Salk. 66; 1 Ld. Raym. 68. See *The Queen v. Brighton* (Inhabitants of), 1 B. & Smith, 447, 453.

CHAPTER IV.

OF GUARDIAN AND WARD.

THE only private relation now remaining to be discussed, is that existing between guardian and ward, the guardian being always the parent, or (at least) *in loco parentis*, to the ward, and the ward being always an infant. In examining this subject we shall take occasion to consider, first, the legal condition of an infant; next, the different species of guardians recognized in the law of England; and, lastly, the rights and duties of such guardians.

I. The legal condition of an infant (which we have already found occasion to notice in other parts of this work) may be considered in reference to various points,—amongst others, as to his capacity to commit a *crime*, a subject that will be considered hereafter(*a*). We shall, at present, treat only of infancy in reference to civil purposes.

Infancy (or minority) is the period of life, whether in males or females, which precedes the age of twenty-one,—an age at which they are competent for all that the law requires them to do, and which is therefore designated as *full age* (*b*). This age (*c*) is gained on the day preceding the twenty-first anniversary of a person's birth (*d*); and as in the computation of time the law in general allows no fraction of a day, it follows that if born on the evening of

(*a*) Vide post, bk. VI. c. II.

(*b*) 1 Hale, P. C. 28.

(*c*) Co. Litt. 171 b.

(*d*) Salk. 44, 625; Ld. Raym. 480, 1096; Toder v. Sansam, Dom. Proc. 27 Feb. 1775.

the first day of January, a person is of age to do any legal act on the morning of the last day of December in the twenty-first year afterwards, though he will not have lived twenty-one years by nearly forty-eight hours (*f*). [Among the antient Greeks and Romans *women* were never of age, but subject to perpetual guardianship, unless when married—*nisi convenissent in manum viri*,—and when that perpetual tutelage wore away in process of time, we find that in females as well as males full age was not till twenty-five years (*g*). Thus, by the constitutions of different kingdoms, this period, which is merely arbitrary and *juris positivi*, is fixed at different times. Scotland agrees with England in this point: both probably copying from the old Saxon constitutions on the continent, which recognized twenty-one as the age of majority (*h*).]

An infant has various special capacities and incapacities. He cannot be sued but under the protection, and joining the name, of his guardian (*i*); that is, his guardian *ad litem*, appointed by the court for the purpose of the particular suit: and on the other hand, he may by leave of the court sue either by a guardian *ad litem*, or, what amounts to the same thing, by his *prochein amy*, that is, by any friend willing to undertake his cause (*k*). It is also a privilege belonging to infants, that they lose nothing during their minority by non-claim or neglect of

(*f*) See Christian's Blackst. vol. i. p. 463, (n.)

(*g*) See Pott. Antiq. b. 4, c. 11; Cic. pro Muræ. 12; Inst. 1, 23, 1.

(*h*) Stiernhook de Jure Sueonum, l. 2, c. 2.

(*i*) Co. Litt. 135 b; Castledine v. Mundy, 4 Barn. & Adol. 90.

(*k*) Co. Litt. ubi sup., and n. by Harg.; Goodwin v. Moore, Cro. Car. 161. (And see Collins v. Brook, 4

II. & N. 270.) By the Acts regulating the County Courts, (see 9 & 10 Vict. c. 95; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61, and 19 & 20 Vict. c. 108,) an infant is enabled to prosecute in those courts any suit for wages or piece work not exceeding 50*l.*, as if he were of full age. See sect. 64 of the Act first mentioned.

demanding their rights. For though persons of full age (as we shall see hereafter) are barred by their omission to take any step towards the recovery of their rights within a certain period of time, it is otherwise with respect to infants; who are not bound to claim upon a title or cause of action which first accrues to them while they are under age, until after the expiration of a period commencing from their attainment of majority (*l*). It is indeed laid down generally as a maxim, that no laches or negligence shall be imputed to an infant; but this is chiefly true of the exemption which he enjoys (as just stated) from the ordinary bar by lapse of time; and it cannot safely be understood in a much larger sense (*m*). It is also laid down, that an infant can neither make any conveyance or purchase that will bind him (*n*); nor enter into a binding contract (*o*); nor be sworn as a juror (*p*); nor sit and vote in parliament (*q*); nor become a bankrupt (*r*); nor hold any public office of pecuniary trust, or (as it would seem) of a judicial kind (*s*); nor, in short, do any legal act (*t*). But to this general condition of incapacity, there are exceptions, to some of which it will be proper here to advert. And, first, though an infant is generally under disability where he acts on his own account, yet he is under none when acting as *agent* for another person (*u*). For the person by whom he is appointed agent, is the best judge of his ability in that particular case. [So an infant who has an advowson, that is, the perpetual right to present to a benefice, may present to the benefice when it becomes void (*x*). For the law in this case dispenses with one rule, in order

(*l*) Vide post, bk. v. c. ix.

(*m*) Co. Litt. 380 b.

(*n*) Vide sup. vol. i. p. 476.

(*o*) Vide sup. p. 62.

(*p*) Bac. Ab. Infancy, E.; 6 Geo. 4, c. 50, s. 1.

(*q*) Whitelock, c. 50; 4 Inst. 47; 7 & 8 Will. 3, c. 25.

(*r*) Vide sup. p. 151.

(*s*) Claridge v. Eveline, 5 Barn. & Ald. 81; Bac. Ab. Infancy, E.

(*t*) 1 Bl. Com. 466.

(*u*) Prestwick v. Marshall, 7 Bing. 565.

(*x*) Co. Litt. 172 b; Co. Litt. by Harg. 89 a, note (1).

[to maintain others of far greater consequence; it permits an infant to present a clerk, who, if unfit, may be rejected by the bishop,—rather than either suffer the church to be unserved till the infant comes of age; or permit him to be debarred of his right by lapse to the bishop, which is the legal consequence of a neglect to present in due time.] So an infant may be sworn as a witness, however young, provided he understands the nature of an oath (*y*). He may also at the age of twelve take the oath of allegiance (*z*); and (as we have seen) at the age of fourteen, if a male, or of twelve, if a female, may consent to marriage (*a*). Again, though infants cannot, as a general rule, so alien or purchase estates but that the transaction shall be voidable at their pleasure, on the attainment of full age (*b*),—yet by 13 & 14 Vict. c. 60, ss. 7 and 20, it shall be lawful for the Court of Chancery to make an order (*c*), vesting the lands of which any infant may be possessed as trustee or mortgagee, in such person or persons and in such manner as the court shall direct, or to appoint a person to convey the same; which order shall have the same effect as if the infant had been twenty-one and had duly executed a conveyance of the estate in question (*d*). By the statute, also,

(*y*) 2 Hale, P. C. 278; Co. Litt. by Harg. 172 b, n. (1).

(*z*) Co. Litt. 172 b.

(*a*) Vide sup. p. 244.

(*b*) Co. Litt. 2 b; Zouch v. Parsons, 3 Burr. 1794; vide sup. vol. I. p. 476.

(*c*) See also 11 Geo. 4 & 1 Will. 4, c. 65. In re Clark, Law Rep., 1 Ch. App. 292.

(*d*) We may also remark here, that by 6 Geo. 4, c. 74, s. 11, stock standing in the name of an infant beneficially entitled thereto may, on the petition of the guardian, and by order of the court, be transferred to the guardian, for the benefit of the infant; and that by 8 & 9 Vict. c.

97, s. 3, where stock is standing in the Bank books in the names of an infant or person of unsound mind and of some other person jointly, it is made lawful for such last-mentioned person to grant a power of attorney to receive the dividends thereon. See also the Inclosure Act, 8 & 9 Vict. c. 118, s. 20, providing for the case of persons under similar disabilities being interested in lands proper to be inclosed, and 13 & 14 Vict. c. 60, s. 48, providing for the disposal of monies to which such persons may be entitled in certain cases arising under that Act; and 16 & 17 Vict. c. 70, s. 82, enabling the infant next

of 18 & 19 Vict. c. 43, any male person of twenty years, or female of seventeen years of age, may, with the sanction of the Court of Chancery, make a valid and binding settlement either of real or personal estate, in contemplation of marriage; and by 19 & 20 Vict. c. 120 (for facilitating leases and sales of settled estates), all the powers given by that Act to the Court of Chancery, and all applications under the same, and consents to such applications, may be exercised, made or given by guardians on behalf of infants (*e*). Other important exceptions, also, attach to the general rule, that an infant cannot enter into a contract that shall bind him; and though there is a great want of precision in the doctrines scattered through the books on this subject, the result of them has been stated (and apparently with good reason) to be as follows (*f*)—that all contracts which the court can pronounce to be to the infant's prejudice are void; all those which it can pronounce to be for his benefit are valid; and those which fall not distinctly under one predicament or the other, are voidable at his election. According to these distinctions, his contract to pay a penalty has been held absolutely void, being evidently to his detriment (*g*); and on the same principle, his contract of service for a fixed period was held void, where it contained a stipulation enabling the master to stop the work at pleasure, and, during such period of suspension, to stop also the wages (*h*). But on the other hand, an infant may apprentice himself in the ordinary form of such a contract,—that being manifestly for his benefit (*i*). And on the same

of kin of a lunatic, to be represented by guardian in the proceedings under a lunacy inquiry or commission.

(*e*) 19 & 20 Vict. c. 120, s. 36. As to this Act (amended by 21 & 22 Vict. c. 77, and 27 & 28 Vict. c. 45), vide sup. vol. I. pp. 252, 266, 279, 470.

(*f*) *Keane v. Boycott*, 2 H. Bl.

511; see 2 Kent, Com. 193.

(*g*) *Co. Litt.* 172 a; *Fisher v. Mowbray*, 8 East, 330; 3 Mau. & Sel. 482; *Corpe v. Overton*, 10 Bing. 252.

(*h*) *Queen v. Lord*, 12 Q. B. 757.

(*i*) *Gylbert v. Fletcher*, Cro. Car. 179; *R. v. Wigston*, 3 Barn. & Cress. 486.

ground he may bind himself to pay for his necessary meat, drink, apparel, physic, and other such necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards (*k*); and in determining what shall be necessities, regard is to be had in each particular case to the infant's degree or station in life (*l*); and he is not liable for goods supplied to him while living unmarried under the roof of his parent, by whom his wants were sufficiently provided for, and who gave no consent to the purchase (*m*). His contracts, however, fall in the majority of cases under the third description above enumerated, viz. that of being voidable (*n*); but even here he may, by confirmation, or, in some cases, mere acquiescence, after he becomes of age, render himself liable to perform them; and the case is the same with respect to his purchases and alienations (*o*). Thus if he has made a contract for goods, though of a kind not falling within the description of necessities, he may, after he has come of age, confirm the contract by an express ratification in writing (*p*). So if a lease has been

(*k*) Co. Litt. 172 n.

(*l*) See *Burghart v. Hall*, 4 Mee. & W. 727; *Harrison v. Fane*, 1 Man. & G. 550; *Wharton v. Mackenzie*, 5 Q. B. 606; *Ryder v. Wombwell*, Law Rep., 3 Exch. 90; *ib.* 4 Exch. 32. It has been said that necessities for an infant's wife or for his lawful child, are necessities for *him* (*Turner v. Trisby*, 1 Str. 168); and an infant widow has been held liable on her contract to pay for her husband's funeral. (*Chapple v. Cooper*, 13 Mee. & W. 252.)

(*m*) See *Bainbridge v. Pickering*, 2 Bl. Rep. 1325; *Dalton v. Gib*, 5 Bing. N. C. 198. As to when the *parent* will be liable for necessities supplied to his child, vide sup. p. 290.

(*n*) As to the nature and extent of an infant's liability for *calls* made by a company of which he is a member, see 8 & 9 Vict. c. 16, ("Companies Clauses Consolidation Act, 1845"); *North-Western Railway Company v. McMichael*, 5 Exch. 114; and *Dublin, &c., Railway Company v. Black*, 8 Exch. 181.

(*o*) See *Ebbett's case*, In re Constantinople, &c. Company, Law Rep., 5 Ch. App. 302.

(*p*) 9 Geo. 4, c. 31, s. 5. See *Borthwick v. Carruthers*, 1 T. R. 648; *Williams v. Moor*, 11 Mee. & W. 256; *Mawson v. Blane*, 10 Exch. 206; *Willins v. Smith*, 4 Ell. & Bl. 180; *Rowe v. Hopwood*, Law Rep., 4 Q. B. 1.

made to an infant during his minority, he may ratify it by continuing in possession after he has attained the age of twenty-one (*q*); or if he has demised lands, by his accepting rent after such time (*r*). It is besides to be understood, that, though infants are exempted from liability for mere breach of contract, the law allows them no such privilege in respect to injuries of any other kind. Thus, as will be noticed hereafter in its proper place, they are answerable for crimes long before their attainment of full age (*s*). And so likewise an action may be brought against an infant for an injury independent of contract, such as a slander, an assault, or a trespass (*t*).

II. Having thus obtained some general idea of the legal condition of infants (who are alone capable of becoming *wards*), let us next explain briefly the distinctions between one kind of guardian and another,—there being several species of guardianships existing in the law of England (*u*).

1. Guardianship *by nature*. This species is that which belongs to the father in respect of the person of his heir apparent, or of his heiress presumptive (*x*). And there is, properly speaking, no other kind of guardianship by nature than this; and the term natural guardian, as applied to the father or mother in reference to all their children, is rather a popular than a technical mode of expression,—for when a father's right to the person of a child

(*q*) 1 Roll. Ab. 731, l. 45; Ketsey's case, Cro. Jac. 320; 3 Burr. 1719; 8 Taunt. 37. See North-Western Railway Company *v.* McMichael, 3 Exch. 114.

(*r*) Baylis *v.* Dineley, 3 Mau. & Sel. 481.

(*s*) Vide post, bk. VI. c. II.

(*t*) See Green *v.* Greenbank, 2 Marsh. 485; Defries *v.* Davies, 1 Bing. N. C. 692; Jennings *v.* Rundall, 8 T. R. 335; Burnand, app.,

Haggis, resp., 14 C. B. (N. S.) 45. In this last case, an infant was held liable for a *wilful injury* he had done to a horse let to him by the plaintiff.

(*u*) The guardian, with us, is equivalent, according to Blackstone (vol. i. p. 460), to the *tutor* and *curator* of the Roman law.

(*x*) See Co. Litt. by Harg. 88, notes 63—71, 15th ed.; 3 Rep 38 b; sup. vol. I. p. 389.

who is not his heir apparent is intended, his guardianship is properly that next to be noticed (*y*).

2. Guardianship *for nurture*, then, applies to all the children; and, like the last, extends to the person only. It belongs to the father, and at his decease, to the mother, and is said to last only to the age of fourteen, both with males and females (*z*). But though after that age, the father or mother may not be properly designated as guardian for nurture, yet the parent is understood to stand substantially in the capacity of guardian to his children so long as they are minors, by having the care and control of their persons during that period (*a*).

3. Guardianship *in socage* extends, on the other hand, to the estate as well as to the person. This species occurs only where the legal estate in lands or other hereditaments held in socage descends upon a minor (*b*); in which case the guardianship devolves upon his next of blood to whom the inheritance cannot descend (*c*). For though proximity of blood is a natural recommendation to this office, the law at the same time judges it improper to trust the person of an infant in his hands, who may by possibility become such infant's heir; so that there may be no temptation, or even suspicion of temptation, for him to abuse his trust (*d*).

(*y*) Mr. Hargrave holds that the term natural guardian, or guardian by nature, when not applied to an heir apparent, signifies only that nature points out the parent as the proper guardian, where positive law is silent. (Co. Litt. by Harg. p. 88.)

(*z*) Ibid. 88, n. (13); Ratcliffe's case, 8 Rep. 38 b.

(*a*) See 1 Bl. Com. 461; 2 P. Wms. 116; Mellish v. De Costa, 2 Atk. 14; Mendes v. Mendes, 3 Atk. 624; Macpherson on Infant, p. 81.

(*b*) It is settled, though the point was formerly in controversy, that

there can be no such guardianship where the infant is *in* by purchase. Co. Litt. by Harg. 87 b, n. (1).

(*c*) Ibid. 88. Mr. Hargrave is of opinion that the guardianship in socage of the next in blood extends to the *personal* estate; and also (where there is no special custom that the lord of the manor shall appoint a guardian) to the *copyhold* estates. But see as to the personalty, Vaughan, 185; Rotherham v. Fanshawe, 3 Atk. 629; Litt. s. 123; Bac. Ab. Guardian, B.

(*d*) "*Nunquam custodia alicujus de jure alicui remanet, de*

This guardianship in socage, like that for nurture, continues only until the minor is fourteen years of age; except in the case of land held in gavelkind, where the office lasts a year longer (*r*).

4. Guardianship *by statute* is by virtue of an act of Charles the second. For by 12 Car. II. c. 24, it was provided that a father might by deed or will dispose of the custody of such of his children as should be infants and unmarried at his death, or who should be born posthumously, to any person he pleased,—in such manner as to be effectual against all persons claiming to be guardians in socage or otherwise, and so that the guardian he thus appointed should have the custody of the persons of their wards, and of all their estate both real and personal (*s*). It is to be observed that this statute makes no mention of a mother, who is consequently not made capable by it of appointing a guardian to her children (*t*).

5. Guardianship *by election* is a mode of appointment recognized by the law, though not of frequent occurrence. For an infant having lands in socage may, after fourteen, when the guardianship in socage terminates, elect a guardian for himself, if there be no other then ready to take charge of him and his property; and, according to Lord Coke, the same thing may be done in

quo habeatur suspicio quod possit vel velit aliquod jus in ipsa hereditate clamare." Glanv. l. 7, c. 11. See St. Hibern. 14 Hen. 3. This policy of our English law is warranted by the wise institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. Pott. Antiq. bk. 1, c. 26; and see Petit. Leg. Att. l. 6, t. 7.

(*r*) Bac. Ab. Guardian, A. 2.

(*s*) 12 Car. 2, c. 24, s. 8; Co. Litt. by Harg. 88. See Lord Shaftesbury's case, 2 P. Wms. 103;

Ex parte Earl of Ilchester, 7 Ves. 348; Gilliat v. Gilliat, 3 Phill. Rep. 222. As to what words in a will are sufficient to appoint a guardian, see Miller v. Harris, 14 Sim. 540. As to the rights of guardians as against each other, when more than one is appointed, see Gilbert v. Schwenck, 14 Mee. & W. 488.

(*t*) Vaughan, 180; Ex parte Edwards, 3 Atk. 519. Cases falling within the custom of London or of other corporate towns, are excepted from the operation of this Act. (1 Bl. Com. 462.)

certain cases by an infant under fourteen. But the law on this subject is obscure; and as such an election, at whatever age it is made, will in no case supersede the authority of the court of chancery to interfere for the infant's protection in the manner to be presently explained, this kind of guardianship is now almost wholly disused (*u*).

6. Guardianship *by appointment of the Court of Chancery* (*x*). This species, now so important as in a manner to have superseded that of socage, is of modern origin; and gradually established itself since the introduction, by the statute of Charles the second, of guardians by the father's appointment. For it was soon found expedient to provide for cases in which the father failed to exercise his statutory power (*y*). The court of chancery, then, if application be made to it on behalf of an infant possessed of property, will appoint him one for protection both of his person and estate (*z*); and indeed this jurisdiction will be exercised, if sufficient reason should appear, notwithstanding the existence of a guardian in socage (*a*). Moreover, the court will thus interfere in favour of a *bastard* if necessary; and where a parent has named a guardian by will for a child of this description (which he has no authority under the statute to do) the court will in general afford relief by appointing the same person (*b*). So, also,

(*u*) Co. Litt. by Harg. 88; 3 Atk. 624; *Curtis v. Rippon*, 4 Madd. 462.

(*x*) As to the jurisdiction of the Court of Chancery over the person and property of infants, see Spence, *Equit. Jur.* vol. i. p. 611. The case of *Stuart v. Bute* (Marquis of), 9 H. of L. Cas. p. 440, may also be consulted.

(*y*) See 3 Bl. Com. 426; Co. Litt. ubi sup.; 2 Fonb. Tr. Eq. 228, note, 2nd edit.; *De Manneville v. De Manneville*, 10 Ves. 52; et post, bk. IV. pt. I. c. VI.

(*z*) As to the practice on such

application, and as to the choice of a guardian by the court, see *In re Kaye*, Law Rep., 1 Ch. Ap. 387.

(*a*) 2 Fonb. Tr. Eq. 235.

(*b*) *Christian's Blackstone*, vol. i. p. 462; *Peckham v. Peckham*, 2 Cox, 46. There formerly existed another species of guardianship by statute, viz. that by construction of the 4 & 5 Phil. & M. c. 8, which enabled a father, by deed or will, to assign a guardian to his daughter under sixteen. (1 Bl. Com. 461.) But this statute was repealed by 9 Geo. 4, c. 31.

where there has been a guardian appointed under the statute, the court will regulate his conduct, and even deprive him of all authority, where it seems necessary for the real interests of the infant (*c*). By the institution, also, of a suit as to the estate of an infant, he becomes a *ward of the court*; who, in that case, will take the direction of his estate, and appoint a guardian for his person only (*d*). And any person marrying a ward of court, without permission, will be guilty of contempt, punishable by commitment to prison (*e*). But an infant *not possessed of property* cannot be made a ward; nor will the court in general appoint a guardian for an infant so circumstanced; though to this there are certain exceptions (*f*). For under the Marriage Act of 4 Geo. IV. c. 76, the court has authority to appoint a guardian for the purpose of consenting to the marriage of any infant having no father, or unmarried mother, or other guardian; and in certain instances, also, to give its judicial sanction to the marriage, where the consent of the father, mother, or guardian cannot be obtained (*g*). And by 3 & 4 Vict. c. 90, the court may take any infant (whether possessed of property or not) who has been convicted as a felon, out of the control of his parents or other guardians (if it shall appear expedient); and may assign the custody of him (subject always to the execution of his sentence on conviction) to such other persons as may be willing to be entrusted with the charge, and to provide for his maintenance and education.

7. Guardianship *ad litem* arises where a person (usually the father or other ordinary guardian) is appointed by a court of justice to prosecute or defend for an infant in any suit to which he or she may be party—a practice to

(*c*) Spence's Equitable Jurisdiction of the Court of Chancery, vol. i. p. 613.

(*d*) McPherson on Infants, 105.

(*e*) Herbert's case, 3 P. Wms. 116.

(*f*) See *Ex parte Becher*, 1 Bro. C. C. 556.

(*g*) 4 Geo. 4, c. 76, ss. 16, 17; and see 19 & 20 Vict. c. 119, s. 2; et sup. pp. 249, 300.

which we have already had occasion to refer in the course of this chapter (*h*).

8. Guardianship *by custom*; comprehending, first, that existing in copyhold; which belongs of common right to the next of blood to whom the copyhold cannot descend; or, by special custom, to the lord or his nominee (*i*). Secondly, the guardianship founded on local custom, of which that of London is the most remarkable. This, we are told, entitles the mayor and aldermen, in their Court of Orphans (*k*), to the custody of the person, lands and chattels of every infant whose parent was free of the city of London (at least if he also died within the city): and such custody lasts, in the case of males, till twenty-one; of females, till eighteen or marriage. It is said, however, to be fallen into disuse (*l*).

III. Lastly, as regards the rights and duties of guardians in general.

1. The legal custody of the person of an infant belongs in general to the guardian; who, if the child be detained from him, may sue a writ of *habeas corpus* out of any of the superior courts, to have his ward brought before the court, and delivered over (if of tender age) to himself (*m*); and where the father is the guardian, he is entitled in

(*h*) Vide sup. p. 303. By 13 & 14 Vict. c. 35, an ordinary guardian may concur, on behalf of his ward, in stating a special case for the opinion of the court.

(*i*) 2 Watk. Cop. 101; Co. Litt. by Harg. 88; Clench v. Cudmore, 3 Lev. 395; R. v. Wilby, 2 M. & S. 504; 3 Salk. 177. See 11 Geo. 4 & 1 Will. 4, c. 65, ss. 3–10.

(*k*) As to this court, see Pulling's Customs of London, p. 196.

(*l*) See Co. Litt. 88b; McPherson on Infants, 48. It may be noticed that at one period the *ecclesiastical court*, also, claimed a right in some

cases to appoint guardians: and to this Blackstone (vol. i. p. 461) makes some reference. But even prior to the transfer of all matters testamentary or relating to intestacies from these courts to the new Probate Court (vide sup. p. 193), the jurisdiction of the ordinary, in this behalf, had been much controverted. (See Co. Litt. by Harg. 88 z, on p. 132, folio edit.)

(*m*) See R. v. Isley, 5 Ad. & El. 144; Earl of Westmeath's case, Jac. 251; Queen v. Smith, 22 L. J. (Q. B.) 116; Reg. v. Clarke, 7 Ell. & Bl. 186.

general to this remedy, even as against the mother (*p*); though, on the other hand, the mother of an illegitimate child may claim the possession of it upon *habeas corpus*, in preference to the reputed father (*q*). A child, however, of age sufficiently mature to exercise a choice on such a subject will in no case be delivered over upon *habeas corpus* to the legal guardian, not even to the father, but will be allowed to leave the court in freedom (*r*). And where an infant, of whatever age, is possessed of property, so as to fall within the jurisdiction of the court of chancery, that court will always interfere to protect it against a guardian (even though he be also the parent), whose conduct renders him grossly unfit for the office (*s*). Besides which, it has been enacted by 20 & 21 Vict. c. 85, s. 35, and 22 & 23 Vict. c. 61, s. 4, that in any proceeding for obtaining a judicial separation, or decree of nullity of marriage, and on a petition for dissolving a marriage, the New Divorce Court may make provision in or after its decree with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceeding (*t*); and may (if it think fit) direct proper means to be taken for placing such children under the protection of the court of chancery.

2. With respect to the property of the ward, a guardian in socage is said to have, not barely an authority over, but an actual estate in the land, as *dominus pro tempore*;

(*p*) See Murray's case, 5 East, 223; Earl of Westmeath's case, *ubi sup.*; Ex parte McClellan, 1 Dowl. 81; R. v. Greenhill, 4 Ad. & El. 624. But as to children within the age of *seven years*, see 2 & 3 Vict. c. 54; *sup.* p. 295.

(*q*) R. v. Hopkins, 7 East, 579; Ex parte Ann Knee, 1 N. R. 148.

(*r*) See The Queen v. Clarke, 7 Ell. & Bl. 186; Reg. v. Howes, 20 L. J. (M. C.) 47.

(*s*) See Shelley v. Westbrook, Jac. 266; De Manneville v. De

Manneville, 10 Ves. 59; Wellesley v. Wellesley, 2 Bligh (N. S.) 124.

(*t*) It seems questionable whether in the exercise of this jurisdiction, the rules laid down by the Court of Chancery as to guardianship, generally, will be strictly followed. (See Robotham v. Robotham, 1 Swab. & Trist. 190; Curtis v. Curtis, *ib.* 192; Marsh v. Marsh, *ib.* 312; Suggate v. Suggate, *ib.* 492; Mallinson v. Mallinson, Law Rep., 1 P. & D. 221.)

and to have a right either to demise it, or to occupy it himself for the ward's benefit(*u*); and to be entitled, in his own name, to bring actions against trespassers(*x*); and the law appears to be the same with respect to a guardian by statute; but no guardian can aliene the ward's estate, except by way of lease during the ward's minority; and a demise for a longer period becomes void as soon as the period of guardianship determines(*y*). A guardian by appointment of the Court of Chancery has, in some respects, less power over the ward's property; for he can receive of the profits of the infant's estate no more than the court shall think fit to allow for his or her maintenance; and such guardian can grant no leases except by the same sanction; though, on the other hand, such sanction will enable him or any other guardian to make a lease that will bind the infant even after he attains twenty-one(*z*), or to surrender a lease vested in an infant, with a view to its renewal(*a*). Finally, it is to be observed, that every guardian of the estate, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses from wilful default or negligence; and the ordinary method of enforcing such liability is by proceedings in equity for that purpose, which may be instituted even during the ward's minority(*b*). In such account, allowance shall be made to him for all his reasonable costs and expenses(*c*); but he is not permitted in any case to make a profit out of his ward's estate(*d*).

(*u*) Plowd. 293; *R. v. Sutton*, 3 Ad. & El. 597.

(*x*) *Wade v. Baker*, Lord Raym. 131; *R. v. Sutton*, *ubi sup.*

(*y*) *Bac. Ab. Leases*, I. 9; *R. v. Sutton*, *ubi sup.*; and see *Roe v. Hodgson*, 2 Wils. 129, 135.

(*z*) 11 Geo. 4 & 1 Will. 4, c. 65, s. 17.

(*a*) Sect. 12. By the same statute, s. 32, the Court of Chancery has power to order the divi-

dends of stock belonging to an infant to be paid for his maintenance, &c. See also 19 & 20 Vict. c. 120, s. 36, (cited *sup.* p. 306,) as to applications, &c., under that Act, by a guardian on behalf of his ward.

(*b*) *Eyre v. Shaftsbury*, 2 P. Wms. 119.

(*c*) Litt. s. 123; *R. v. Sutton*, *ubi sup.*

(*d*) *Ibid.*; Plowd. 293.

BOOK IV.

OF PUBLIC RIGHTS.

PART I.

OF THE CIVIL GOVERNMENT.

WE have now taken a general survey of those rights and duties which attach to a man, individually considered; and that both as regards his person and his property. We have also examined those which belong to him in his private or domestic relations, as member of a family. But we have still to contemplate him as a citizen or member of the community at large(*a*): and to treat of the rights and duties attributable to him in that public capacity; and which he consequently exercises in common with the whole, or with large portions, of the community. This we propose to do under the general head of *public rights*; understanding *duties* (as we have done throughout) as involved in the correlative term of *rights*; and deeming it, therefore, unnecessary to refer to them by a separate designation. Public rights, then, concern either the relation between persons in authority, and persons subject to authority,—or they concern the social condition in general. And, again, persons in authority are either

(*a*) See the division laid down at the commencement of the work, vol. I. p. 138.

of a civil or an ecclesiastical character; so that the whole subject of public rights naturally resolves itself into three parts, and may be discussed under the following titles—The Civil Government—the Church—and the Social Economy:—and it is to the first of these, that we shall at present devote our attention.

CHAPTER I.

OF THE PARLIAMENT.



[THE public rights which first claim our attention, are those which concern the relation in which men stand to one another, as governors and governed; or, in other words, as magistrates and people. Of magistrates, some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior and secondary sphere.

In all tyrannical governments, the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, in England, this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of sovereign, lords and commons; the other executive, consisting of the sovereign alone. It will be the business of this chapter to consider the British

[parliament, in which the legislative power, and the supreme and absolute authority of the state, is vested by our constitution.

The original or first institution of parliament is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word *parliament* itself (*parlement* or *colloquium*, as some of our historians translate it) is comparatively of modern date, derived from the French, and signifying an assembly that meets and confers together. It was first applied to general assemblies of the states under Louis VII. in France, about the middle of the twelfth century (*a*); though what was in later times termed in that country a parliament, was only a high court of justice. In England the term seems not to have been used till the reign of Henry the third (*b*), or Edward the first (*c*). But it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm; a practice which seems to have been universal among the northern nations, particularly the Germans (*d*); and carried by them into all the countries of Europe which they overran at the dissolution of the Roman empire; relics of which constitution, under various modifications and changes, were even in modern times perceptible in the diets of Poland, Germany, and Sweden, and the assembly of the Estates in France.

With us in England this general council hath been held immemorially, under the several names of *michel-synoth* or great council, *michel-gemote* or great meeting, and

(*a*) Mod. Un. Hist. xxiii. 307. See also Lappenberg's England under the Saxons, vol. ii. p. 284.

(*b*) Pryne on 4 Inst. 2.

(*c*) But according to some authorities the "wittenagemote" was thus called as early as the time of William the Conqueror. (See Mill,

Eng. Gov. 11, 85.) The first mention of it in our statute law is in the preamble to statute Westminster I., 3 Edward 1, A.D. 1275.

(*d*) "*De minoribus rebus principes consultant, de majoribus, omnes.*"—Tac. de Mor. Germ. c. 11.

[more frequently *wittena-gemote* or the meeting of wise men. It was also styled in Latin, *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis*, and sometimes *communitas regni Angliæ* (*e*). We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to mend the old,—or, as Fleta expresses it, “*novis injuriis emersis, nova constituere remedia*,”—so early as the reign of Ina king of the West Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy (*f*). And, after their union, the *Mirroure* (*g*) informs us, that King Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener if need be, to treat of the government of God’s people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice of his *wittena-gemote*, as “*hæc sunt instituta, quæ Edgarus rex consilio sapientum suorum instituit*,” or to be enacted by those sages with the advice of the king, as “*hæc sunt judicia, quæ sapientes consilio regis Ethelstani instituerunt*,” or, lastly, to be enacted by them both together, as “*hæc sunt institutiones quas rex Edmundus et episcopi sui cum sapientibus suis instituerunt*” (*h*).

There is also no doubt but these great councils were occasionally held under the first princes of the Norman line. Glanvil, who wrote in the reign of Henry the

(*e*) Glanvil, l. 13, c. 32; l. 9, c. 10; Pref. 9 Rep.; 2 Inst. 156.

(*f*) See Fleta, l. 2, c. 2.

(*g*) C. 1, s. 3.

(*h*) “All their laws” (the laws of the Anglo-Saxons) “express the assent of this council, and there are instances where grants made

“without its concurrence have been revoked. It was composed of prelates and abbots, of the aldermen of shires, and, as it is generally expressed, of the noble and wise men of the kingdom.”—Hallam, *Mid. Ages*, vol. ii. p. 388, 7th ed.

[second, speaking of the particular amount of an amercement in the sheriff's court, says it had never been yet ascertained by the general assize, or assembly, but was left to the custom of particular counties (*i*). Here the general assize is spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to custom, or the common law. And in Edward the third's time an act of parliament, made in the reign of William the Conqueror, was pleaded in the case of the Abbey of St. Edmund's-bury, and judicially allowed by the court (*k*).

Hence it indisputably appears that parliaments, or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed is another question, which has been matter of great dispute among our learned antiquaries; and particularly, whether the commons were summoned at all; or, if summoned, at what period they began to form a distinct assembly (*l*). But it is not intended here to enter into controversies of this sort. It is generally agreed, that, in the main, the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of King John, A.D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, within forty days' notice, to assess aids and scutages when necessary. And this constitution has subsisted in fact at least from the year 1264, 49 Henry III.; there being still extant writs of that date to summon knights, citizens and burgesses to parliament (*m*). We may proceed, therefore, to inquire

(*i*) Fleta, l. 9, c. 10.

(*k*) Year Book, 21 Edw. 3, 60.

(*l*) On these subjects, see Hallam, Mid. Ages, vol. iii. c. 8.

(*m*) "It is well known that the

" earliest writs of summons to cities

" and boroughs, of which we can

" prove the existence, are those of

" Simon de Montfort, Earl of Lei-

" cester, bearing date 12th Decem-

[wherein consists this constitution of parliament, as it now stands, and has stood for the space of at least six hundred years. And in the prosecution of this inquiry shall be considered, first, the manner and time of its assembling; secondly, its constituent parts; thirdly, the laws and customs relating to parliament, considered as one aggregate body; fourthly and fifthly, the laws and customs relating to each house, separately and distinctly taken; sixthly, the methods of proceeding, and of making statutes, in both houses; and lastly, the manner of the parliament's adjournment, prorogation, and dissolution.]

I. As to the manner and time of assembling. The parliament is summoned by the sovereign's writ or letter, issued out of chancery by advice of the privy council. By a provision of Magna Charta, forty days were ordained to elapse between the date of the writ and the time of assembling (*n*); and this was re-enacted by 7 & 8 Will. III. c. 25. But now by 15 & 16 Vict. c. 23, the period has been shortened to thirty-five days. [It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any, except the sovereign alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be called together at a determinate time and place; and highly becoming its dignity and independence,

“ber, 1264, in the forty-ninth year
“of Henry the third. After a long
“controversy, almost all judicious
“inquirers seem to have acquiesced

“in admitting this origin of popular
“representation.”—Hallam, *Mid.*
Ages, vol. iii. p. 40.

(*n*) Black. Mag. Chart. Joh. 14.

[that it should be called together by none but one of its own constituent parts. And of the three constituent parts, this office can only appertain to the sovereign: as this is a single person, whose will may be uniform and steady; the first person in the nation, being superior to the houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being. Nor is it an exception to this rule that, by some modern statutes, on the demise of the sovereign, if there be then no parliament in being, the last parliament revives, and is to sit again for six months, unless dissolved by the successor; for this revived parliament must have been originally summoned by the crown (*o*).

It is true, that, by a statute, 16 Car. I. c. 1, it was enacted, that if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one; and in case of neglect of the peers, the electors for counties and boroughs might meet and choose their own representatives. But this, if ever put in practice, would have been liable to all the inconveniences just now stated; and the Act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II. c. 1. From thence, therefore, no precedent can be drawn.

It is also true, that the convention-parliament, which restored King Charles the second, met above a month before his return: the lords by their own authority; and the commons, in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament: and that the said parliament sat till the 29th of December, full seven months after the Restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And

(*o*) Vide post, p. 393.

[the first thing done after the king's return was to pass an Act declaring this to be a good parliament, notwithstanding the defect of the king's writ (*p*). So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides, we should also remember, that it was at that time a great doubt among the lawyers, whether even this healing Act, made it a good parliament (*q*); and that it was held by very many in the negative; though it seems to have been too nice a scruple (*r*). And yet, out of abundant caution, it was thought necessary to confirm its Acts in the next parliament, by statute 13 Car. II. c. 7 and c. 14.

It is likewise true, that at the time of the Revolution, A.D. 1688, the lords and commons by their own authority, and upon the summons of the Prince of Orange (afterwards King William), met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the Restoration; that is, upon a full conviction that King James the second had abdicated the government, and that the throne was thereby vacant; which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And in such a case as the palpable vacancy of a crown, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For let us put another possible case, and suppose for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne; in this situation it seems

(*p*) Stat. 12 Car. 2, c. 1.

(*q*) 1 Sid. 1.

(*r*) William Drake, a merchant of London, was impeached for writing a pamphlet, entitled *The Long Parliament revived*, in which he main-

tained that there could be no legislative authority till that was legally and regularly dissolved by the king and the two houses of parliament, according to 16 Car. 1, c. 7. (Com. Journ. 20th Nov. 1660.)

[reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention of 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant; but, the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but, as it was really empty, such meeting became absolutely necessary. And accordingly it is declared, by statute 1 W. & M. st. 1, c. 1, that this convention was really the two houses of parliament, notwithstanding the want of writs, or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, (and each of which, by the way, induced a revolution in the government,) the rule laid down is in general certain, that the sovereign, only, can convoke a parliament.

And this, by the antient statutes of the realm, he is bound to do every year, or oftener, *if need be(s)*. Which last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments neglected the convoking them sometimes for a very considerable period, under pretence that there was no need of

(s) 4 Edw. 3, c. 14; 36 Edw. 3, c. 10. Blackstone notices, (vol. i. p. 153,) that these statutes did not render it necessary to call a *new* parliament every year, but only to permit a parliament to sit annually for the redress of grievances and despatch of business, *if need be*. As to the words "*if need be*," it has been argued (and apparently with good reason), that they serve

to qualify only the words "*or oftener*," and that the true signification of the enactment is, that parliament should be held once every year at all events; and if need be, then more than once; and in support of this are cited 50 Edw. 3, Rot. Parl. No. 186; 1 Rich. 2, Rot. Parl. No. 95; 2 Rich. 3, Rot. Parl. No. 4.

[them. But to remedy this, by the statute 16 Car. II. c. 1, it is enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 W. & M. st. 2, c. 2, it is declared to be one of the rights of the people, that, for redress of all grievances, and for the amending, strengthening and preserving the laws, parliaments ought to be held *frequently*; besides which, it is by a subsequent statute, 6 W. & M. c. 2, further provided, that a new parliament should be called within three years after the determination of a former one (*t*). But the importance of these provisions is in modern times lessened by the course of the public business, the exigencies of which now lead invariably to the assemblage of parliament in every year.

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the sovereign sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal (who sit, together with the sovereign, in one house), and the commons, who sit by themselves, in another. And the sovereign and these three estates together, form the great corporation or body politic of the kingdom (*u*); of which the sovereign is said to be *caput, principium, et finis*. For upon their coming together, the sovereign meets them, either in person or by representation; without which there can be no beginning of a parliament; and the crown also has alone the power of dissolving them (*x*).

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by

(*t*) 6 & 7 W. & M. c. 2, s. 2. Hale, of Parl. 1.

(*u*) 4 Inst. 1, 2; stat. 1 Eliz. c. 3; (*x*) 4 Inst. 6.

[making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the first, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances, and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder therefore any such encroachments, the sovereign is himself a part of the parliament: and, as this is the reason of his being so, therefore, the share of legislation, which the constitution has placed in the crown, very properly consists in the power of rejecting rather than resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong, but merely of preventing wrong from being done (*y*). The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it: and herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved; while the sovereign is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within

(*y*) "*Sulla—tribunis plebis suâ ademit, auxilia ferendi reliquit.*"
lege injuriæ faciendæ potestatem De Leg. 3, 9.

[due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not, indeed, of the sovereign, which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors (*x*). Thus, every branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation and artificially connected together by the mixed nature of the crown, which is a part of the legislature, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.]

Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's (or queen's) majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer.

The next in order are the "spiritual lords." These consist of the Archbishops of Canterbury and York; of the Bishops of London, Durham, and Winchester, and of twenty-one other bishops (*y*). [And they hold, or are sup-

(*x*) See stat. 12 Car. 2, c. 30.

(*y*) The whole number of bishops (exclusive of the archbishops) is (as we have seen, sup. vol. I. p. 116) *twenty-six*. But only twenty-four of the bishops have seats in the house of lords. After the union with Ireland in the year 1801, there also sat and voted in the house

of lords, as representatives of the Irish church, the Archbishop of Dublin (or of Armagh alternately) and three Irish bishops. But it formed one of the enactments of the Irish Church Act, 1869, that after the 1st January, 1871, no archbishop or bishop of the church of Ireland (dis-established by that Act

[posed to hold, certain antient baronies under the crown; for William the Conqueror thought proper to change the spiritual tenure of frank-almoign, or free alms, under which the bishops held their lands during the Saxon government, into the feudal or Norman tenure by barony; which subjected their estates to all civil charges and assessments from which they were before exempt (*z*). And in right of succession to those baronies, which were unalienable from their respective dignities, the bishops were allowed seats in the house of lords (*a*). The lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in many of our acts of parliament; yet in practice, they are usually blended together under the one name of “the lords;” they intermix in their votes; and the majority of such intermixture binds both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued very cogently, that the lords temporal and spiritual are now, in reality, only one estate (*b*); which is unquestionably true in every effectual sense, though the antient distinction between them still nominally continues. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden (*c*)

and separated from the church of England) shall be summoned to or be qualified to sit in the house of lords. (32 & 33 Vict. c. 42, s. 13.) It may be here noticed, that at one time of our history there were also comprised among the “spiritual lords” twenty-seven mitred abbots and two priors, and this continued till the dissolution of the monasteries by Hen. 8. (See Co. Litt. 97; Sedl. Tit. Hon. 2, 5, 27.)

(*z*) Gilb. Hist. Exch. 55; Spelm. W. I. 291.

(*a*) On this subject, see Co. Litt. by Harg. 134 b, n. (1); Hallam’s Hist. Mid. Ages, vol. iii. pp. 6—8, 7th edition. Notwithstanding the

baronies here mentioned, the prelates do not strictly rank, according to the prevalent opinion, as peers of the realm. They have a right, however, in common with the temporal lords, to the appellation of “lords of parliament.” (See Staunford, P. C. 158; 1 Bl. Com. p. 157.)

(*b*) Whitelock on Parliam. c. 72; Warburt. Alliance, b. ii. c. 3; and see Dyer, 60.

(*c*) Baronage, p. 1, c. 6. The Act of Uniformity, 1 Eliz. c. 2, was passed with the dissent of all the bishops, (Gibs. Codex, 286,) and therefore the style of lords spiritual is omitted throughout the whole.

[and Sir Edward Coke give many instances(*d*): as, on the other hand, it would presumably be good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill. Though Sir Edward Coke seems to doubt whether this would not be an ordinance, rather than an Act, of parliament(*e*).]

The “lords temporal” consist exclusively of *peers*,—or, as they may be otherwise described, persons of the rank of nobility, by whatever title of nobility distinguished, dukes, marquesses, earls, viscounts, or barons; of which dignities we shall speak more hereafter. These for the most part sit in their own right, but a certain number of them sit in a representative capacity. Those of them who so sit, are they who, under the Acts of Union with Scotland and Ireland(*f*), are elected to represent in the house of lords the body of the Scottish and Irish nobility respectively(*g*).

(*d*) 2 Inst. 585—587. See Keilw. 184, where it is holden by the judges, 7 Hen. 8, that the king may hold a parliament without any spiritual lords. This was also exemplified in fact, in the two first parliaments of Charles the second; wherein no bishops were summoned, until after the repeal of the statute 16 Car. 1, c. 27, by statute 13 Car. 2, stat. 1, c. 2.

(*e*) 4 Inst. 25.

(*f*) Vide sup. vol. I. pp. 87, 96.

(*g*) The dignity of peerage is to be considered not merely as a title to a seat in parliament, but as a rank in the community; a view of it, which we shall have occasion to take at large in a subsequent chapter (chap. IX.). When so considered, the existing dignities admit of the following distribution:—They are, first, such as in their creation were peerages of England; secondly, such as were peerages of the united kingdom of Great Britain; thirdly,

such as were peerages of the united kingdom of Great Britain and Ireland; fourthly, such as were peerages of Scotland; fifthly, such as were peerages of Ireland:—the dates of the first class being antecedent to the union with Scotland in 1707; of the second class being subsequent to that event and antecedent to the union with Ireland in 1801; of the third class being subsequent to the union last mentioned; of the fourth class being antecedent to the union with Scotland; of the fifth class being either antecedent to the union with Ireland, or subsequent;—several Irish peerages having been created since that event, under a power for creating such peerages contained in the articles of the Irish union. The three first classes of peerages all confer seats in the House of Lords; the fourth and fifth a right to elect representatives who are to have seats therein.

The Scottish representative peers are sixteen in number, and the Irish twenty-eight (*h*): and the former are elected for one parliament only; but the Irish, for life: and these last, therefore, hold their seats in parliament on the same tenure as the peers of England. [The aggregate number of the lords temporal for the time being is indefinite, and may be increased at will by the power of the Crown (*i*): and, in the reign of Queen Anne, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of King George the first, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought, by some, to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new created lords. But the bill was ill-relished, and miscarried in the house of commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible.

The distinction of rank and honours is necessary in every well-governed state: in order to reward such as are eminent for their services to the public, in a manner the most desirable to individuals, and yet without burden to the community: exciting thereby an ambitious yet laudable ardour and generous emulation in others. And emulation, or virtuous ambition, is a spring of action, which, however, dangerous or invidious in a mere republic or under a

(*h*) As to the manner of proceeding in the election of the sixteen Scottish peers, see 6 Ann. c. 23; 2 & 3 Will. 4, c. 63; 10 & 11 Vict. c. 52; 14 & 15 Vict. c. 87; 15 & 16 Vict. c. 35. And as to the election of the Irish peers, 39 & 40 Geo. 3, c. 67, and 20 & 21 Vict. c. 33.

(*i*) In the 1st page of the 4th Institute Lord Coke tells us, that

the number of temporal peers when he was then writing, was 106. In an article in the Quarterly Review for January, 1858, it is stated that the peerages of the *United Kingdom* amounted (in that year) to 455 in number; and that there were, also, 183 Scotch and Irish peerages *not* of the United Kingdom.

[despotic sway, will certainly be attended with good effects under a free monarchy: where, without destroying its existence, its excesses may be continually restrained by that superior power from which all honour is derived. Such a spirit, when nationally diffused, gives life and vigour to the community; it sets all the wheels of government in motion, which, under a wise regulator, may be directed to any beneficial purpose; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views. A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. It creates and preserves that gradual scale of dignity which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to another, we may pronounce that state to be precarious. The nobility, while thus in a general point of view essential to the structure of the constitution, are of the more particular importance, as forming the immediate support of the throne. Accordingly, when, in the time of the Great Rebellion, the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. And since titles of nobility are thus expedient to the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons.

[The commons, who form the remaining branch of the parliament, consist of the representatives of the nation at large (exclusive of the peerage), elected by the means that we shall have occasion to explain in the course of this chapter. In a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, may be exercised by the people in their aggregate or collective capacity, as was ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours, it is therefore very wisely contrived that the people should do that, which it is impracticable to perform in person, by their representatives, who are chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished.] Accordingly the counties(*k*) are represented in our parliament by those members who are technically called knights of shires(*l*), and the cities

(*k*) "The counties are therefore represented by knights, elected by the proprietors of lands: the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part or supposed trading interest of the nation." (1 Bl. Com. p. 159.)

(*l*) Of the English and Welsh counties, Yorkshire returns ten members; Lancashire, eight members—nine counties, six members each, and sixteen of the others, four members each; viz. two for each division;—each division being considered as a separate county for all

and boroughs by those who are, in like manner, termed citizens and burgesses (*m*). The universities, also, of Oxford, Cambridge, and London, are represented by persons chosen by their respective graduates (*n*). The collective number of English and Welsh representatives is (at present) 491 (*o*), of Scottish 60, of Irish 105, in all 656 (*p*). [And every member, though chosen by one particular district, when elected and returned, serves for the whole realm: for the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the commonwealth; to advise the crown (as appears from the writ of summons) “*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus*” (*q*). And therefore he is not bound to consult with,

electoral purposes. The number of members for each of the remaining counties (including the Isle of Wight, which ranks, for electoral purposes, as a separate county), is to be three, two, or one respectively. By 30 & 31 Vict. c. 102, s. 9, it is enacted that at a contested election for a county returning three members, no person shall vote for more than two candidates. This provision will apply to Berkshire, Bucks, Cambridgeshire, Dorset, Herefordshire, Herts, and Oxfordshire, each of which is to be represented by three members.

(*m*) Of the cities and boroughs, London returns four members; Manchester, Liverpool, Birmingham and Leeds respectively three; most of the others two, and the remainder one. See 2 Will. 4, c. 45, s. 8, and sched. E; 30 & 31 Vict. c. 102, s. 18. By the Act last mentioned (ss. 9, 10), at a contested election for any borough returning three members, no person shall vote

for more than two candidates; or in the city of London, for more than three. In *Wales*, the right of election for some of the principal towns or boroughs represented is shared by other boroughs, which are called “contributory boroughs.” (See 31 & 32 Vict. c. 58, s. 16.)

(*n*) The four universities of Scotland, and that of Dublin, are also duly represented in the united House of Commons.

(*o*) In the time of Lord Coke, the number was 493 (4 Inst. 1).

(*p*) By 7 & 8 Vict. c. 53, and 15 & 16 Vict. c. 9, the boroughs of Sudbury and St. Albans were wholly disfranchised for bribery. By 30 & 31 Vict. c. 102, (amended in this particular by 31 Vict. c. 6,) the same punishment for the same cause was inflicted on the boroughs of Totnes, Reigate, Great Yarmouth, and Lancaster; and by 33 & 34 Vict. c. 21, on the boroughs of Bridgewater and Beverley.

(*q*) 4 Inst. 14.

[or take the advice of, his constituents upon any particular point, unless he himself thinks proper and prudent so to do.

These are the constituent parts of a parliament: the king, the lords spiritual and temporal, and the commons: parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law, by one, or by two only, of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in the time of the Great Rebellion, the commons once passed a vote(*r*), “that “whatever is enacted or declared for law by the commons “in parliament assembled, hath the force of law; and “all the people of this nation are concluded thereby, “although the consent and concurrence of the king or “house of peers be not had thereto;”—yet, when the constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II. c. 1, that if any person should maliciously or advisedly affirm that both or either of the houses of parliament have any legislative authority without the king, such persons should incur all the penalties of a *præmunire*; that is, the forfeiture of lands and goods, imprisonment, and loss of all civil rights(*s*).

III. We are next to examine the laws and customs relating to parliament, thus united together and considered as one aggregate body.

The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendant and absolute, that it cannot be confined, either for causes or persons, within any bounds(*t*). And of this high court, he adds, it may be truly said, “*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est*

(*r*) 4th Jan. 1648.

(*t*) 4 Inst. 36.

(*s*) Vide post, bk. VI. c. VI.

[*capacissima*.” It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of Henry the eighth and William the third. It can alter the established religion of the land: as was done in a variety of instances, in the reigns of king Henry the eighth and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the acts of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo: so that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great lord treasurer Burleigh, “that England could never be ruined but by a parliament;” and, as Sir Matthew Hale observes (*u*), “this being the “highest and greatest court, over which none other can “have jurisdiction in the kingdom, if by any means a “misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of

(*u*) Of Parliaments, 49.

[“remedy.” To the same purpose the president Montesquieu, though it is to be hoped too hastily, presages that as Rome, Sparta and Carthage have lost their liberty, and perished, so the constitution of England will in time lose its liberty, and will perish ; it will perish whenever the legislative power shall become more corrupt than the executive (*x*).

It must be owned that Mr. Locke, and other theoretical writers have held, that “there remains still inherent in “the people a supreme power to remove or alter the “legislative, when they find the legislative act contrary “to the trust reposed in them: for, when such trust is “abused, it is thereby forfeited, and devolves to those “who gave it” (*y*). But however just this conclusion may be in theory, we cannot practically adopt it, nor take any legal steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power to the people at large includes in it a dissolution of the whole form of government established by that people ; reduces all the members to their original state of equality ; and by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation ; nor will they make provision for so desperate an event as must render all legal provisions ineffectual. So long, therefore, as the English constitution lasts, we may venture to affirm that the power of parliament is absolute and without control.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper, to manage it, it is part of the custom and law of parliament, that no one shall sit or vote in either house, unless he be twenty-one years

(*x*) Sp. L. 11, 6.

(*y*) On Gov. p. 2, ss. 149, 227.

[of age (*z*). This is also expressly declared by statute 7 & 8 Will. III. c. 25, with regard to members of the house of commons; doubts having arisen, from some contradictory adjudications, whether or no a minor was incapacitated from sitting in that house (*a*). It was also enacted by statutes 30 Car. II. st. 2, and 1 Geo. I. sess. 2, c. 13, that no member should vote or sit in either house till he had in the presence of the house taken the several oaths of allegiance, of supremacy, and of abjuration.] However, in place of these, a single oath was provided by 29 & 30 Vict. c. 19 (the Parliamentary Oaths Act, 1866), to be used by every member of either house on taking his seat—the words of which (since recently again resettled) have been now framed so as to suit all members, whether they belong or not to the Church of England (*b*). And it is also provided that Quakers and such others as are permitted by law to *affirm*, instead of swearing, are to make and subscribe their “affirmation” on taking their seat in the same form as other members of the house, with the substitution only of words making it an affirmation and not an oath (*c*). Aliens, unless naturalized, were likewise by the law of parliament incapable to serve therein (*d*); and it was enacted, by statute 12 & 13 Will. III. c. 2, that no person born out of the united kingdom or the dominions thereunto belonging, even though he were naturalized or made a denizen (except such as were born

(*z*) Whitelock, c. 50; 4 Inst. 37.

(*a*) Com. Journ. 16 Dec. 1690.

(*b*) The form of the present oath (as settled by 31 & 32 Vict. c. 72, in place of the oath provided by 29 & 30 Vict. c. 19) will be found post, p. 402.

(*c*) See 29 & 30 Vict. c. 19, s. 4; 31 & 32 Vict. c. 72, s. 11. A general permission to affirm instead of using the words applicable to an *oath*, was given to *Quakers* and *Moravians* by 3 & 4 Will. 4,

c. 49, and to *Separatists* by 3 & 4 Will. 4, c. 82; a statute which describes these last as “a class or sect of Dissenters, who from conscientious scruples refuse to take an oath in courts of justice and other places.” And by 1 & 2 Vict. c. 77, the same indulgence was extended to those who *have* been Quakers and Moravians, and still retain conscientious objections to taking an oath.

(*d*) 1 Com. Journ. 10 Mar. 1623.

of English parents), should be capable of being a member of either house of parliament (*e*). [Moreover, if any person be made a peer by the crown, or elected to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member; and this by the law and custom of parliament (*f*).

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti*; a law which, Sir Edward Coke observes, is, “*ab omnibus querenda, a multis ignorata, a paucis cognita*” (*g*). It will not, therefore, be expected that we should enter into the examination of this law with any degree of minuteness, since, as the same learned author assures us it is much better to be learned out of the rolls of parliament, and other records, and by precedents and continual experience, than can be expressed by any one man (*h*). It will be sufficient to observe, that the whole of the law and custom of parliament has its original from this one maxim, “that whatever matter arises concerning either house of parlia-

(*e*) The provision of the 12 & 13 Will. 3, c. 2, on this subject is stated by the editors of the “Revised Statutes” (vol. ii. p. 96) to have been “virtually repealed” by the 7th section of the Naturalization Act, 1870 (33 & 34 Viet. c. 14), whereby it is enacted, that an alien to whom a certificate of naturalization is granted, “shall, in the united kingdom, be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled.

(*f*) Whitelock of Parl. c. 102.

See Lords’ Journ. 3 May, 1620; 13 May, 1624; 26 May, 1725; Com. Journ. 14 Feb. 1580; 21 Jan. 1628; 21 Jan., 9 Nov. 1640; 6 Mar. 1676; 6 Mar. 1711; 3 Feb. 1769; 17 Feb. 1769; 3 May, 1783; and vide post, p. 366.

(*g*) 1 Inst. 11. “As to what my Lord Coke says, ‘*lex parliamenti est a multis ignorata*,’ that is only because they will not apply themselves to understand it,” per Holt, C.J., 2 Ld. Raym. 1114.

(*h*) 4 Inst. 50.

[“ment ought to be examined, discussed and adjudged in “that house to which it relates, and not elsewhere” (*l*). Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess. But the maxims upon which it proceeds, together with the method of proceeding, rest entirely in the breast of the parliament itself (*m*).]

The *privileges* of parliament are also very considerable, and were principally established in order to protect its members, not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown (*n*). Their extent is nowhere clearly defined; and accordingly we find, that when in the thirty-first year of Henry the sixth, the house of lords propounded a question to the judges concerning them, the chief justice, Sir John Fortescue, in the name of his brethren, declared “that they ought not to make answer “to that question; for it hath not been used aforetime “that the justices should in anywise determine the privileges of the High Court of Parliament. For it is so “high and mighty in its nature, that it may make law; “and that which is law it may make no law; and the “determination and knowledge of that privilege belongs “to the lords of parliament, and not to the justices” (*o*).] A more manly tone, however, is perceptible in the doctrine of Lord Holt (delivered at a period when the principles of the constitution were better understood), “that the authority of parliament is from the law, and as it is circumscribed by law, so it may be exceeded; and if they do “exceed those legal bounds and authority, their acts are

(*l*) 4 Inst. 15.

(*m*) By the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), an impugned return of a burgess is first examined into by some of the judges of the superior courts of common law, on whose report the house issues its directions as

to confirming or altering the return or issuing a writ for a new election as circumstances may require (vide post, p. 378).

(*n*) 1 Bl. Com. 164.

(*o*) Seld. Baron. part i. c. 4; 3 Wils. 183; Burdett v. Abbott, 14 East, 1; 4 Taunt. 401

“wrongful and cannot be justified, any more than the acts of a private man” (*p*). In strict conformity with which later and more satisfactory opinion,—when a person, sued in the Queen’s Bench for an alleged violation of private right, pleaded, that the act was done under the authority of an order of the house of commons,—the court held that it was not precluded, on the ground of parliamentary privilege, from considering whether the authority of the house constituted, in point of law, a sufficient justification of the act; nor from giving judgment in favour of the plaintiff, if it deemed the justification insufficient (*q*).

[The more notorious privileges of the members of either house are as follows: First, privilege of speech, as to which it is declared by the statute 1 W. & M. sess. 2, c. 2, to be one of the liberties of the people, “that the freedom of speech, and debates and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.” And this freedom of speech is particularly demanded of the sovereign by the speaker of the house of commons, at the opening of every new parliament (*r*).]

Secondly, privilege of person: for a peer (by virtue of his dignity) is exempt from arrest in civil cases at all times (*s*); and a member of the house of commons (by the privilege of parliament) is so exempt, while the house is sitting, and also for such a period before the first meeting, and after the dissolution of a parliament, as may enable him conveniently to come to the house from and return to any part of the kingdom (*t*). [This immunity continues also for forty days after every prorogation, and for forty

(*p*) Salk. 505; 2 Ld. Raym. 1114.

(*q*) See *Stockdale v. Hansard*, 9 Ad. & Ell. 1; 11 Ad. & Ell. 253; *Howard v. Gossett*, 10 Q. B. 359.

(*r*) See May’s Parliamentary Practice, p. 56 (3rd edit.)

(*s*) See 6 Rep. 62; 9 Rep. 49 a,

68 a; 2 Hen. Bla. 272; *Conche v. Lord Arundel*, 3 East, 127; 1 Vent. 298; *Davis v. Lord Rendlesham*, 7 Taunt. 679; *R. v. Bishop of St. Asaph*, 1 Wils. 332.

(*t*) See *Cassidy v. Steuart*, 2 Man. & Gr. 169.

[days before the next appointed meeting (*u*); which is now in effect so long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. The only way, indeed, by which courts of justice could antiently take cognizance of this exemption was by writ of privilege in the nature of a supersedeas, to deliver the member out of custody when arrested in a civil suit (*x*). For when a letter was written by the speaker to the judges to stay proceedings against a privileged person, they rejected it as contrary to their oath of office (*y*). But after the statute 11 & 12 Will. III. c. 3, had enacted, that no privileged person should be subject to arrest or imprisonment, it was held that such arrest was irregular *ab initio*, and that the party might be discharged upon motion (*z*). It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I. c. 13, and that of King William, (which remedied some inconveniences arising from privilege of parliament,) spoke only of civil actions. And therefore the claim of privilege was usually guarded with an exception as to indictable crimes (*a*); or, as it was frequently expressed, of treason, felony, and breach (or surety) of the peace (*b*). And so fully was this exception established, that instances are not wanting wherein privileged persons were convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session (*c*); which proceeding afterwards received the sanction and approbation of par-

(*u*) 2 Lev. 72; Goudy *v.* Duncombe, 1 Exch. 430.

(*x*) Dy. 59; 4 Pryn. Brev. Parl. 757. This immunity from arrest in civil cases is now of less importance by reason of the provisions of the Debtors Act, 1869, whereby, with certain exceptions, *no* person can be arrested or imprisoned for making default in payment of a sum of money. (32 & 33 Vict. c.

62, s. 4.)

(*y*) Latch, 48; Noy, 83.

(*z*) Str. 989; see Cassidy *v.* Stuart, 2 Scott, N. R. 432; et vide 10 Geo. 3, c. 50, cited post, p. 344.

(*a*) Com. Journ. 17th Aug. 1641.

(*b*) 4 Inst. 25; Com. Journ. 20th May, 1675.

(*c*) Mich. 16th Edw. 4, in Scacc. Ld. Raym. 1461.

[liament(*d*). To which it may be added, that the case of writing and publishing seditious libels, was resolved by both houses not to be entitled to privilege(*e*); and that the reasons upon which that resolution proceeded, extend equally to every indictable offence. Even in indictable cases, however, there belongs to the houses of parliament the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained (*f*); a practice which is recognized by several temporary statutes for suspending the *Habeas Corpus* Act(*g*); whereby it is provided that no member of either house shall be detained till the matter of which he stands suspected be first communicated to the house of which he is a member, and the consent of the house obtained for his commitment or detaining. But yet the usage has uniformly been, ever since the Revolution, that the communication has been subsequent to the arrest.

There were formerly other privileges of parliament, protecting the lands and goods of the members, and even their menial servants, not only from illegal violence, but also from seizure under the civil process of the courts of law. And even yet to assault by violence a member of either house, or his menial servants, is a high contempt of parliament, and there punished with the utmost severity; and had likewise peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. IV. c. 6, and 11 Hen. VI. c. 11.] But all parliamentary exemptions from liability to civil process, save only as to the freedom of the person of the member himself, are now at an end; having

(*d*) Com. Journ. 16th May, 1726.

(*e*) Ibid. 24th Nov.; Lords' Journ. 29th Nov. 1763. This was so held (a short time before the houses so resolved) by the judgment

of Lord Camden and the Court of Common Pleas (2 Wils. 151).

(*f*) Com. Journ. 20th Apr. 1762.

(*g*) See particularly 17 Geo. 2, c. 6.

been first restrained, and at length totally abolished, by the legislature. For by 10 Geo. III. c. 50, it was enacted, that any action or suit might be brought against a member of either house, or against his servants, or against any other person entitled to privilege of parliament; and that none such, nor any process, or proceeding thereupon, should be impeached, stayed or delayed by pretence of privilege, —except that the person of a member should not thereby be subjected to any arrest or imprisonment (*h*).

In addition to these privileges of speech and of person belonging to the two houses of parliament, we may remark, that their right freely to publish their own reports, papers, votes, and other proceedings, is specially protected by statute. For it is provided by 3 & 4 Vict. c. 9, that one who is sued or prosecuted on account of the publication of such matters by authority of either house, may have the proceedings against him stayed, and all process therein superseded, on production to the court of a proper certificate to that effect; and that no person shall be liable to any civil or criminal proceeding for printing extracts or abstracts of parliamentary documents, provided he do so *bonâ fide* and without malice (*i*).

It is moreover clearly settled, that in any case in which the privileges of either house of parliament have been violated, it has power to commit to prison the person guilty of such contempt (*h*); and also, by its order, to set at liberty any one who, in breach of its privileges, has been arrested in respect of any act by him done in his capacity of member of parliament (*l*).

(*h*) And see the previous statutes, 11 & 12 Will. 3, c. 3; 2 & 3 Anne, c. 18; 11 Geo. 2, c. 24.

(*i*) See *Stockdale v. Hansard*, 11 Ad. & El. 297, as to the practice, on application to the court under this statute.

(*h*) See *Burdett v. Abbott*, 14

East, 158; *Stockdale v. Hansard*, 9 Ad. & El. 1; 11 Ad. & El. 253.

(*l*) 1 Jac. 1, c. 13. See *Burdett v. Abbott*, 14 East, 143; and the cases of breach of privilege enumerated, *Stockdale v. Hansard*, 9 Ad. & El. 12, note (*b*).

These are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to—

IV. The laws and customs relating to the house of lords in particular, which will, however, take up but little of our time.

[One very antient privilege, (only worth mentioning as illustrative of a former era,) is that declared by the Charter of the Forest (*m*), confirmed in parliament in the ninth year of Henry the third: viz. that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant: in view of the forester, if he be present, or on blowing a horn if he be absent; that he may not seem to take the king's venison by stealth.]

In the next place the peers have a right to be attended by the judges (and also by certain of her Majesty's counsel) for the greater dignity of their proceedings. And in the exercise of their appellate jurisdiction, it has often been their practice to request the opinion of the judges, in point of law, upon the question which is before them for their determination (*n*). [The secretaries of state, with the attorney and solicitor-general, were also used to attend the house of peers, and have to this day, (together with the judges and other persons above mentioned) their regular writs of summons issued out at the beginning of every parliament, *ad tractandum et consilium impendendum*, though not *ad consentiendum* (*o*); but whenever of late years they have been members of

(*m*) C. 11.

(*n*) As to this appellate jurisdiction of the House of Lords, and the effect upon it of the Judicature Act,

1873, vide sup. vol. I. p. 6.

(*o*) Stat. 31 Hen. 8, c. 10; Smith's Commonw. b. 2, c. 3; Moor, 551; 4 Inst. 4, IIa'e of Parl. 140.

[the house of commons (*p*), their attendance on the lords hath fallen into disuse (*q*).

Another privilege is, that every peer, by licence obtained from the Crown, may make another lord of parliament his proxy (*r*), to vote for him in his absence (*s*). A privilege which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people (*t*).

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his *protest* (*u*).

All bills, likewise, that may in their consequences any way affect the rights of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons; which has, however, the power of rejecting them altogether.

(*p*) See Com. Journ. 11th April, 1614; 8th Feb. 1620; 10th Feb. 1625; 4 Inst. 48.

(*q*) On account of this attendance there are several resolutions before the Restoration, declaring the attorney-general incapable of sitting among the commons. Sir Heneage Finch, member for the university of Oxford, afterwards Lord Nottingham and chancellor, was the first attorney-general who enjoyed that privilege. (Sim. 28.) To the functionaries mentioned in the text, as attendants of the house of lords, Mr. May, in his *Parliamentary Practice* (3rd edit. p. 205), adds the Master of the Rolls.

(*r*) If a peer, after appointing a proxy, appears personally in parliament, his proxy is thereby revoked

and annulled. (4 Inst. 13.) By the orders of the house, no proxy shall vote upon a question of guilty or not guilty; and a spiritual lord shall only be a proxy for a spiritual lord, and a temporal lord for a temporal. However, by an order of March, 1868, the House of Lords suspended the use of proxies on divisions. As to proxies, see also Com. Dig. Parl. D. 19; 4 Inst. 12; 1 Woodd. 41.

(*s*) Seld. Baronage, p. 1, e. 1.

(*t*) 4 Inst. 12.

(*u*) Lord Clarendon relates, that the first instances of protests with reasons, in England, were in 1641, before which time they usually only set down their names as dissentient to a vote. (1 Ld. Mountm. 402.)

[There are also certain statutes which are peculiarly relative to the house of lords. Thus the 6 Anne, c. 63 (*x*), which regulates the election of the sixteen representative peers of North Britain, in consequence of the twenty-second and twenty-third articles of the Union: and for that purpose prescribes the oaths to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner: and expressly provides that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *præmunire*.] Provisions are also made by 39 & 40 Geo. III. c. 67, and 20 & 21 Vict. c. 33, as to the manner of electing the Irish representative peers. And we may also notice that by 34 & 35 Vict. c. 50, it has been enacted, that every peer who shall become *bankrupt* shall be disqualified from sitting or voting in the house of lords, until his bankruptcy shall have been determined as in that Act mentioned (*y*).

V. [The peculiar laws and customs of the house of commons, relate principally to the raising of taxes, and the election of members to serve in parliament (*z*).

First, with regard to taxes; it is the antient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them (*a*); although their grants are not effectual to all intents and purposes,

(*x*) This Act has been amended by 10 & 11 Vict. c. 52; 14 & 15 Vict. c. 87; and 15 & 16 Vict. c. 35. See also 2 & 3 Will. 4, c. 63.

(*y*) 34 & 35 Vict. c. 50, s. 4. As to bankrupt peers, see also Newcastle v. Morris, Law Rep., 4 Eng. & Ir. Ap. Ca. 661.

(*z*) The offices of the house of

commons, and the salaries of the different officers, are regulated by 52 Geo. 3, c. 11; 2 & 3 Will. 4, c. 105; 4 & 5 Will. 4, c. 70; 9 & 10 Vict. c. 77; 12 & 13 Vict. c. 72; 18 & 19 Vict. c. 84; 19 & 20 Vict. c. 1.

(*a*) 4 Inst. 29.

[until they have the assent of the other two branches of the legislature. The general reason given for this exclusive privilege of the house of commons is, that the supplies are raised upon the body of the people; and therefore it is proper that they alone should have the right of taxing themselves, through their representatives in that house. This reason would be unanswerable if the commons taxed none but themselves; but it is notorious that a very large share of property is in the possession of the house of lords; that this property is equally taxable and taxed as the property of the commons: and therefore the commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this: The lords being a permanent hereditary body, created at pleasure by the sovereign, are supposed more liable to be influenced by the crown, and when once influenced, to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their grants. And so reasonably jealous are the commons of this valuable privilege, that they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill: under which appellation are included all bills by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever: either for the exigencies of government, and collected from the kingdom in general; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like. And the rule is even extended to all bills in which pecuniary penalties and fines are imposed for offences; though it should seem to be carried beyond its

[original principle, when the money raised is not granted to the crown (*b*).]

Next, with regard to the election of the members of whom the house of commons consists, it is (in a general sense, and subject to certain regulations and restrictions) the act of the people at large. For, in our mixed and free constitution, the law concedes to the people (as before explained), not only the right of being represented in the legislative body, but also the choice of their own representatives (*c*). And this being a prerogative of the highest importance (*d*), it has been guarded with great anxiety from usurpation or abuse by many salutary provisions, which may be reduced to these three points:—1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections. These points (so far at least as regards England and Wales, to the law of which the present Commentaries are confined) shall here be considered in some detail.

1. [As to the qualifications of the *electors*. The true reason of requiring any qualification at all with regard to

(*b*) As to this, see 86 Com. J. 477; 104 Com. J. 23. According to Sir Matthew Hale (On Parliaments, 65, 66) it is allowable for the lords to alter a money bill by *shortening* the period for which a tax is granted; in such case he is of opinion that the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without further ceremony. The foundation for this is the practice of parliament in the reign of Hen. VI. (Year Book, 33 Hen. 6, 17; as to which see Com. Journ. 22nd April, 1671.) But Blackstone adds, “such an experiment will hardly be repeated by the lords, under the present improved idea of the privilege of

“the house of commons; and in any case where a money bill is remanded to the commons, all amendments in the mode of taxation are sure to be rejected.” (See 1 Bl. Com. p. 170, and May’s Parl. Pr. p. 426, 3rd ed.)

(*c*) Vide sup. p. 333; et vol. I. p. 32.

(*d*) Blackstone remarks (vol. i. p. 171), that the Athenians were so justly jealous of the popular right of legislation, that a stranger who interfered in the assemblies of the people, was punished by their laws with death; because such a man was esteemed guilty of treason, by usurping those rights of sovereignty to which he had no title.

[property in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, certain qualifications have been necessarily established; whereby some individuals, who are suspected to have no will of their own, are excluded from voting, in order to set others, whose wills may be supposed independent, more thoroughly upon a level with each other.] Hence the main object of our constitution is to secure some share in the election of representatives (so far as that result may in the nature of things be approached), to every person who from his apparent circumstances, can be supposed capable of an independent exercise of the privilege; while, on the other hand, it regulates the distribution of the right of suffrage with some regard to the consideration of comparative wealth or property, by allowing a person, who possesses a qualification in more places than one, to vote in the election for each, and consequently to share in returning several representatives to parliament. Such at least appears to be the general principle of that reformed system of parliamentary representation which, after severe political struggles, has been now established in this country (*e*).

(*e*) Blackstone remarks (vol. i. p. 170), that the constitution of suffrages with us is framed on a wiser principle than either of the methods

But to return to our qualifications; and, first, of those which belong to the county electors.

The knights of shires, (that is to say, the members for counties, or divisions of counties,) are considered as the representatives of the landholders, or landed interest. Their electors, therefore, have been always required by law to have estates in lands or tenements within the county represented (*f*); and an estate to the value of 40*s.* per annum of free tenure, and in which the interest of the voter was freehold, was formerly the invariable qualification. But in the year 1832, by 2 Will. IV. c. 45,—the “Act to amend the “Representation of the people in England and Wales” (commonly called the Reform Act),—new provisions were made with respect to the nature and value of the estates by which county (as well as other) electors are qualified; and they were subjected, for the first time, to a system of registration. And these subjects have now been further regulated by the 30 & 31 Vict. c. 102, “The Representation of the People Act, 1867.” Of all these matters in their order (*g*).

And, in the first place, the lands or tenements in respect of which a vote may be claimed for the county, may now be either of freehold, copyhold or any other tenure. And they may, moreover, be held either in fee or for life or for years, or even by mere occupation (*h*). It is provided, however, that no mortgagee of any lands or tenements

of voting by centuries or by tribes among the Romans. For, by the former method, it was chiefly property which turned the scale (and so laws were produced tending too much to aggrandize the patricians); and, in the latter, numbers only were regarded, which resulted in laws of a too levelling principle.

(*f*) See 8 Hen. 6, c. 7; 10 Hen. 6, c. 2. Such lands or tenements may be within the local limits of any borough in the county,—pro-

vided such borough does not itself return a member to parliament, or if the estate is not in such a tenement as will confer a vote for the borough (vide post, p. 365).

(*g*) As to the analogous measures of reform in reference to *Scotland and Ireland*, see 2 & 3 Will. 4, c. 65; 31 & 32 Vict. c. 48; and 2 & 3 Will. 4, c. 88; 31 & 32 Vict. c. 49.

(*h*) See 2 Will. 4, c. 45, ss. 18, 19, 20; 30 & 31 Vict. c. 102, ss. 5, 6.

shall have any vote by reason of any mortgage therein, unless he be in actual possession or receipt of the rents and profits; but that the right of voting shall be in the mortgagor who remains in actual possession or in receipt of the rents and profits of the estate. So also it has been provided that the trustee of lands or tenements, shall not in any case have a right to vote by reason of his trust estate therein; but that the *cestui que trust* in actual possession or in receipt of the rents and profits—though they be received through the hands of the trustee—may vote for the same (*i*).

The next requisite to be considered is the value of the qualifying estate. And here: 1. As to *freeholds* (*k*). With respect to all freeholders of inheritance—and also with respect to all freeholders *for life*, (provided these last shall be in actual and *bonâ fide* occupation, or shall have acquired their freeholds by marriage, marriage settlement, devise, or promotion to any benefice or office,)—the qualification is the same as was established by law, with respect to all freeholders, before the passing of the Reform Act, viz. “40*s.* by the year at least above all charges” (*l*). But with respect to freeholders *not* of inheritance, but for life only, and who are not themselves in occupation, nor have acquired their estates in any of the ways just mentioned, their lands or tenements must be of “the clear yearly value of not less than 5*l.*, above all rents and “charges payable out of or in respect of the same” (*m*).

(*i*) 2 Will. 4, c. 45, s. 23; 6 & 7 Vict. c. 18, s. 74.

(*k*) As to the qualification of a “freehold rent-charge,” see Nichols v. Bulwer, Law Rep., 6 C. P. 281.

(*l*) 2 Will. 4, c. 45, s. 18. This qualification was established by 8 Hen. 6, c. 7, and subsequently by 18 Geo. 2, c. 18, s. 1. It is remarked by Blackstone (vol. i. p. 173) that the sum of 40*s.* was formerly a more substantial qualification than it appears at the present

time. For he considers Bishop Fleetwood, in his *Chronicon Preciosum*, as having fully proved 40*s.* in the reign of Henry the sixth to have been equal to 12*l.* per annum in the reign of Queen Anne; and Blackstone calculates that this was probably equal to 20*l.* at the date of his own work.

(*m*) 30 & 31 Vict. c. 102, s. 5. By the Reform Act of 1832, the lands or tenements of such freeholders must have been of the clear

2. As to lands or tenements of *copyhold* or *other tenure not being freehold*. Persons seised thereof at law or in equity for life or lives, or for any larger estate, are qualified to vote for the county, if the property be of the “clear yearly value of not less than 5*l.*, over and above all rents and charges payable out of or in respect of the same” (*n*).

3. As to *leaseholds*. Every person entitled, as lessee or assignee, to any lands or tenements (of whatever tenure) for the unexpired residue of a term, is qualified to vote, if the term was originally not less than sixty years (*o*) (whether determinable on life or not), by “a clear yearly value of 5*l.* or upwards over and above all rents and charges payable out of or in respect of the same” (*p*). And if the term was originally not less than twenty years (whether so determinable or not), then by a clear yearly value of 50*l.* or upwards—over and above such rents and charges (*q*). With respect, however, to a sub-lessee, or an assignee of an under lease, it is required, that, in order to vote in respect of such term of twenty years, he should be also in actual occupation of the premises (*r*). 4. As to *the franchise by occupation*. First, every person is qualified by the Reform Act of 1832, “who shall occupy, “*as tenant*, any lands or tenements within the county, for “which he shall be liable to a yearly rent of not less than

yearly value of 10*l.* Prior to that Act an estate of that nature, though amounting only to 40*s.* in yearly value, would have conferred the franchise. However, any individuals who enjoyed freeholds conferring a vote when that Act passed, retain their franchise so long as they are seised of the same freeholds and are duly registered. (2 Will. 4, c. 45, s. 18.)

(*n*) 30 & 31 Vict. c. 102, s. 5.

(*o*) See *Trotter v. Watson*, Law Rep., 4 C. P. 434; *Warburton v. Denton*, ib., 6 C. P. 267.

(*p*) 30 & 31 Vict. c. 102, s. 5. By the Reform Act of 1832, lands and tenements of copyhold or other tenure not being freehold, or being leasehold, must have been of the clear yearly value of 10*l.*, in order to confer a vote. Prior to that statute such property was no qualification at all.

(*q*) 2 Will. 4, c. 45, s. 20.

(*r*) Ibid. This requisition would seem not now to apply, if the term was originally not less than *sixty* years. (See 30 & 31 Vict. c. 102, s. 5.)

“50*l.*” (*s*). Secondly, every person is qualified by the Representation of the People Act, 1867, who, “*as owner or tenant*, shall occupy any lands or tenements within the county, of the rateable value of 12*l.* a year or upwards” (*t*).

Lastly, As to registration. It is in all cases an essential requisite to the right of voting, that the voter shall have been first duly *registered* as such (*u*). In reference to this, the overseers of every parish and township are required (by 6 & 7 Vict. c. 18 and 28 & 29 Vict. c. 36) in every year, on or before the 20th of June, to call, by public notice, on all persons therein entitled to vote for the county, who are not already on the register,—or who have changed their qualification or abode,—and who are desirous of having their names inserted in the register about to be made, to send in to them a notice of claim in writing, before the 20th July in the same year (*v*); and the overseers are to make out lists of persons who have sent in such notices accordingly (*x*). And such overseers are further required (by 30 & 31 Vict. c. 102) themselves to cause to be made out a list of all persons, on whom a

(*s*) 2 Will. 4, c. 45, s. 20. By 6 & 7 Vict. c. 18, s. 73, in case of joint occupation, each occupier may vote, provided the rent, if divided by the number of occupiers, will give 50*l.* for each person.

(*t*) 30 & 31 Vict. c. 102, s. 6. (See *Mather v. Allendale*, Law Rep., 6 C. P. 272.) But before a man can be placed on the register in respect of this franchise by occupation, he must have *paid all the rates* up to the preceding 5th January, as mentioned, post, p. 362. It may be further remarked that in case of a joint occupation, if the rateable value on being divided would give, so far as value is concerned, each occupier a vote, each of them may vote—but not so that more than

two may vote in respect of the same premises, unless they have derived the same by descent, succession, marriage, marriage settlement, or devise, or unless they be partners carrying on business therein (sect. 27).

(*u*) 2 Will. 4, c. 45, s. 26; 6 & 7 Vict. c. 18, s. 2; 28 & 29 Vict. c. 36; 30 & 31 Vict. c. 102, ss. 3—6, &c.

(*v*) 28 & 29 Vict. c. 36, s. 2.

(*x*) The clerk of the peace of each county is to supply the overseers of every parish and township therein with proper forms for this purpose, and with copies of such part of the register for the current year as relates to such parish or township. (28 & 29 Vict. c. 36, s. 3.)

right to vote for the county in respect of the occupation of premises of a certain rateable value is conferred by the Representation of the People Act, 1867,—in the same manner as in regard to voters for boroughs as hereafter mentioned (*y*). And these several lists, together with the register of the preceding year, are afterwards revised by *revising barristers* appointed for the purpose; who hold open courts in order to determine the validity of the votes in every case of objection (*z*), and from whose decision on any point of law there is an appeal to the Common Pleas (*a*). The lists and register, when corrected, are to be transmitted by the revising barristers to the clerk of the peace for the county: who is to copy, and cause them to be printed into a book (*b*). That book is to be delivered complete, on or before the last day of December, to the sheriff, to remain in his custody, and that of his successors (*c*); and it thereupon becomes the *register* of the electors for that county for the then succeeding year (*d*). It is provided, however, that (subject to an exception presently to be mentioned) no person shall be so registered in any year, as a freeholder, copyholder, customary tenant, or tenant in antient demesne, unless he shall have been in the actual possession of the property in respect of which he claims, or in the receipt of the rents and profits thereof for his own use, for *six calendar months*, at least, next previous to the last day of July in such year (*e*); nor as leaseholder, assignee or occupier, unless he shall have been in such receipt, possession or occupation (as the case may

(*y*) 30 & 31 Vict. c. 35, s. 30.

(*z*) In the Law Rep., 4 C. P., there will be found a variety of points arising as to “notices of objection” chiefly under the Representation of the People Act, 1867.

(*a*) As to the appointment of revising barristers and their duties and qualifications, see 6 & 7 Vict. c. 18, ss. 28 et seq.; 26 & 27 Vict.

c. 122, s. 4; 28 & 29 Vict. c. 36; 29 & 30 Vict. c. 54; 35 & 36 Vict. c. 84, and 36 & 37 Vict. c. 70.

(*b*) 6 & 7 Vict. c. 18, s. 47.

(*c*) Ibid.; 30 & 31 Vict. c. 102, s. 38.

(*d*) 6 & 7 Vict. c. 18, s. 49.

(*e*) 2 Will. 4, c. 45, s. 26; see 30 & 31 Vict. c. 102, s. 5.

require) for *twelve* calendar months next previous to such date (*f*). But this is subject to the exception just referred to, viz., that if lands or tenements entitling the owner, holder or occupier under *liability to pay rent* to vote, shall have come to the party at any time within these respective periods, by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to any office, he may claim to have his name inserted as a voter in the then next lists, and be registered accordingly:—no length of possession or receipt of profits being in that case required (*g*). Moreover, with regard to the franchise acquired by the occupation of lands or tenements of the rateable value of 12*l.* or upwards, it is required that the party shall during the preceding twelve months have been rated to all poor rates (if any) made in respect of the premises, and shall, before the 20th July in the same year, have paid *all* the rates which became payable up to the preceding 5th January. We may add to the foregoing remarks that a person once entered on the county register, need make no fresh claim for any succeeding year, so long as the nature of his qualification and his place of abode remain the same (*h*).

So much with respect to the electors of knights of the

(*f*) 2 Will. 4, c. 45, s. 26; 30 & 31 Vict. c. 102, s. 5; and see as to freeholders, 13 Geo. 2, c. 18, s. 5. By 6 & 7 Vict. c. 18, s. 73, tenant occupiers may vote for the county in respect of *different* premises, if occupied in immediate succession for the twelve calendar months. And by 30 & 31 Vict. c. 102, s. 26, a similar rule is made with regard to the occupation of different premises in immediate succession, both in respect of a county and a borough qualification.

(*g*) 2 Will. 4, c. 45, s. 26.

(*h*) See 6 & 7 Vict. c. 18, ss. 5, 6, 79. By 17 & 18 Vict. c. 102, s. 6 (as to which Act, vide post, p. 364), any person on, or claiming to be placed on, the register, who—under the provisions of that statute—has been convicted of bribery or undue influence; or against whom judgment has been obtained for any penal sum made recoverable in respect of those offences, or of treating,—shall have his name expunged or be rejected from the list of voters by the revising barrister.

shire. As for the electors of citizens and burgesses (or members who represent the cities and towns), these are supposed to be the mercantile part or trading interest of this kingdom. But as trade is of a fluctuating nature and seldom long fixed in a place, it was formerly left to the crown to summon, *pro re natâ*, the most flourishing towns to send representatives to parliament (*i*). And thus, at one time, as towns increased in trade and grew populous, they became raised to the rank of parliamentary boroughs (*j*). But this practice having long been discontinued, many towns, which from an obscure original had in modern times risen into high importance, remained altogether unrepresented in parliament, except as forming part of the county in which they lay (*k*). On the other hand, many which had lost their consequence, and some which had become in a manner deserted, were still, according to the antient practice, summoned to return members to the house of commons (*l*); the natural result of which was, to place their elective franchise in effect in the hands of some private proprietor, locally connected with the borough, who was thus enabled to send his own nominees to parliament. But by the Reform Act passed in the year 1832 a new arrangement was made, under which the representation of the trading and manufacturing interests was, in both these particulars, placed upon a different basis; no towns of conspicuous

(*i*) 1 Bl. Com. p. 174.

(*j*) It will be remembered (vide sup. vol. I. p. 125), that a "borough" is properly a town or city represented in parliament, though the term has occasionally (as in the Municipal Corporation Act) a wider signification.

(*k*) See Chit. Prerog. of the Crown, 67, 68; 1 Doug. Elect. 69.

(*l*) A few, however, had from time to time been eased of their parliamentary franchise, upon their own petition, having been desirous

to avoid the burthen then incumbent upon boroughs of paying *wages* to their representatives. A similar burthen also then lay upon counties. The wages for a knight of the shire were 4*s.* a day, for a citizen or burgess, 2*s.*,—according to the rate established in the reign of Edward the third. (Bl. Com. ubi sup.) See Prynne's Fourth Register of Parliamentary Writs, for further information on this subject; also Henry's Hist. of Great Britain, vol. viii. p. 107.

importance being then left unrepresented, and those which had fallen into comparative insignificance being deprived of their rank as parliamentary boroughs (*m*). And now by the Representation of the People Act, 1867, some further efforts have been made in the same direction by reducing the number of members returnable by places of comparatively small population, increasing those which are to be sent by some of the most important towns, and by the creation of certain new boroughs in districts hitherto insufficiently represented (*n*). With respect to the universities of Oxford and Cambridge, their franchise rests upon a different principle: and antiently they were not specially represented in every parliament; [though once in the twenty-eighth year of Edward the first, when a parliament was summoned to consider of the king's right to Scotland, there were issued writs which required the university of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose (*o*). But it was King James the

(*m*) The boroughs thus disfranchised are mentioned in 2 Will. 4, c. 45, sched. A. In sched. O, of 2 & 3 Will. 4, c. 64, the different places then sending members to parliament are enumerated, and their boundaries defined. (See 2 & 3 Will. 4, c. 64, s. 35.) By the 30 & 31 Vict. c. 102, boundary commissioners were appointed to revise these boundaries, and an Act (31 & 32 Vict. c. 46) has now been passed to settle and describe the limits of certain boroughs, and the divisions of certain counties, for the purpose of parliamentary elections. As to *detached* parts of counties, see 7 & 8 Vict. c. 61.

(*n*) By 30 & 31 Vict. c. 102, s. 17, any borough which at the census of 1861, had a population of less than

10,000, was thenceforth to return not more than a single member—a provision which deprived thirty-eight boroughs of one of their members. But, on the other hand, Manchester, Liverpool, Birmingham and Leeds each now returns three members instead of two as formerly (sect. 18). It may be remarked that under the Scotch Reform Act (31 & 32 Vict. c. 48) before alluded to (vide sup. p. 351, *n*.), seven of the smaller English boroughs were wholly disfranchised in order to increase the number of Scotch members, without a corresponding increase in the aggregate numbers of the House. As to the electors in such boroughs for *municipal* or other purposes, see 31 & 32 Vict. c. 41.

(*o*) 1 Prynne's Parl. Writs, 345.

[first who indulged them with the permanent privilege to send constantly two of their own body to serve for those students, who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect in the legislature the rights of the republic of letters.] And a similar privilege has now, by the Representation of the People Act, 1867, been conferred on the modern but important university of London (*p*).

30 & 31
c. 102

Until the passing of the Reform Act of 1832, the right of election for citizens and burgesses depended entirely upon the several charters, customs, and constitutions of the respective boroughs (*q*). This variety formerly occasioned infinite disputes, until in some measure obviated by the 2 Geo. II. c. 24; 28 Geo. III. c. 52, and 34 Geo. III. c. 83, by which it was provided, that any determination of a committee of the house of commons as to the right of voting for any particular place, made under such circumstances as in the Acts specified, should be thereafter conclusive on the subject for ever.

Under the system established by the Reform Act just mentioned, the rights of voting consisted, first, of certain antient rights reserved during the lives of those individuals who enjoyed them at the date of that Act (*r*); secondly, of certain antient rights reserved in perpetuity; and, thirdly, of a new right conferred by the Act.

(*p*) The university of Dublin, the universities of Edinburgh and St. Andrew's (jointly), and the universities of Glasgow and Aberdeen (jointly), are also now represented in parliament. (See 2 & 3 Will. 4, c. 88, and 31 & 32 Vict. c. 48.) As to the mode of election in the universities of Oxford, Cambridge, and London, see 16 & 17 Vict. c. 68; 24 & 25 Vict. c. 53; 30 & 31 Vict. c. 102, ss. 41—46; 35 & 36 Vict. c. 33, pt. iii.; *ib.* s. 31.

(*q*) 1 Bl. Com. 174; Oldfield's Representative History, vol. iii. pp. 1, 2, 9. The words "city or borough," when occurring in the Reform Act, include in general all towns corporate, cinque ports, districts, and places entitled to return after the date of that Act a member or members, other than counties or parts of counties. (2 Will. 4, c. 45, s. 79.)

(*r*) See Russell's Reform Act, p. 30.

The antient rights reserved temporarily were chiefly those which the customs of some boroughs permit to be claimed by the *scot and lot* inhabitants, (*i. e.* such as pay the poor's rate as inhabitants), by the inhabitant householders, and by the *potwallers*, (*i. e.* such as cook their own diet in a fire-place of their own). But the number of those individuals who can claim these franchises has now become so diminished by death, as to be of little practical importance.

The antient rights reserved in perpetuity are such as may be claimed in respect of being a "burgess or free-man" of a parliamentary borough (*s*), or (in counties corporate) being a "freeholder or burgage tenant" (*t*). Accordingly, all who, by the custom of the place, would have been entitled to vote on these grounds if the Reform Act had not been passed, are still permitted to exercise the franchise (*u*)—provided their title accrued on an admission prior to March, 1831, or is founded on *servitude*, (*i. e.* by apprenticeship). But on this class of electors (which is by way of exception only to the general scheme of representation) it is not desirable further to enlarge in this work. And we will therefore turn to the third class—those, namely, whose franchise was newly conferred by the Reform Act of 1832.

(*s*) It may be remarked that in the *city of London*, the qualification is being a *freeman* and *liveryman*. Now the freedom of that city can be obtained in three different methods: 1. By *patrimony*, *i. e.* as the son of a freeman born after the father has acquired his freedom; 2. By *servitude*, *i. e.* by serving an apprenticeship of seven years to a freeman; and 3. By *redemption*, *i. e.* purchase. But besides being free of the city, it is requisite, in order to have a vote as a "freeman and liveryman," to be entitled to wear the *livery* of some one of

the companies, guilds or fraternities of which the corporation of the city of London consists; and the power of calling to the livery is vested in the court or ruling body of the particular company. See 2 Brownl. 286; Minutes of Common Council, 9th March, 1836; Pulling on the Customs of London, 81. As to making out the lists of liverymen, see 6 & 7 Vict. c. 18, s. 20.

(*t*) As to counties corporate, vide sup. vol. I. p. 133.

(*u*) 2 Will. 4, c. 45, s. 32.

The new qualification then established was in respect of the occupation within a parliamentary borough (either as owner or as tenant) *of any house, warehouse, counting-house (x), shop, or other building*, being either separately of the clear yearly value of not less than 10*l.*; or of that value jointly with land in the same borough, occupied by the same party as owner, or as tenant under the same landlord (y). To this qualification the following restrictions are annexed:—The voter cannot be registered in any year unless he shall have occupied the building—or some other building in the borough of the required value, in immediate succession (z)—for *twelve* calendar months next previous to the last day of July in such year; and shall also during such period of occupation have been rated to all the poor rates of the place (a); and shall, on or before the 20th of July, in that year, have paid up all the poor rates and assessed taxes which shall have become payable from him, in respect of the premises, before the 5th of January then last (b); and shall also have resided for six calendar months, next previous to the last day of July in the same year, within the borough, or within *seven* statute miles thereof (c).

Such were the qualifications for borough electors under the Reform Act of 1832, and such they remained without further extension or alteration for a period of thirty-five years. But in the year 1867 the legislature not only effected the alterations in the county franchise, and the redistribution of seats both for counties and boroughs, already mentioned, but also made a fresh attempt to regulate the franchise in boroughs, so as to meet the exigencies of the times and admit the people to share more freely in

(x) See *Piercy v. Maclean*, Law Rep., 5 C. P. 252.

(y) 2 Will. 4, c. 45, s. 27.

(z) Sect. 28; 30 & 31 Vict. c. 102, s. 26.

(a) See 30 & 31 Vict. 102, s. 7; 32 & 33 Vict. c. 41, s. 6; *Stamper*

v. Overseers of Sunderland, Law Rep., 3 C. P. 388.

(b) See 2 Will. 4, c. 45, s. 27; and 11 & 12 Vict. c. 90.

(c) See 2 Will. 4, c. 45, s. 27; and 6 & 7 Vict. c. 18, s. 76.

the representation of the country in parliament. Accordingly by the 30 & 31 Viet. c. 102, to which we have had occasion already to make such frequent reference, two fresh qualifications were made, as follows:—1st, in respect of being “an inhabitant occupier” (either as owner or tenant) of *any dwelling-house* (*e*) within the borough—provided such occupation has lasted for the whole of the twelve months preceding the last day of July in any year, and that during such period he has been rated in respect of the premises to all the poor rates (if any), and has, on or before the 20th of July, in the same year, paid all of the same which became payable up to the preceding 5th day of January (*f*)—and provided also, that such occupation shall not be jointly with any other person (*g*). 2ndly, in respect of being a *lodger* who has occupied in the same borough separately, and as sole tenant, for the twelve months preceding the last day of July in any year, the same lodgings, such lodgings being part of one and the same dwelling-house, and of a clear yearly value, if let unfurnished, of ten pounds or upwards—provided he has resided in the same during such twelve months, and has claimed to be registered as a voter at the next ensuing registration of voters (*h*). It will be observed that the first of these fresh qualifications has introduced into our representative system the novel principle of *household suffrage*, to the extent of giving to every ratepayer in a parliamentary borough a right to vote in respect of any dwelling-house therein which he occupies, irrespective of the value of the premises.

It has already been remarked, that, as in the case of electors for counties, so in that of electors for boroughs,

(*e*) By 30 & 31 Viet. c. 102, s. 61, the term “dwelling-house” is to include “any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor.” See *Cook v. Humber*, 11 C. B., N. S. 33; *Thompson v. Ward*,

Law Rep., 6 C. P. 327.

(*f*) Vide sup. p. 361, n. (*b*).

(*g*) Sect. 3. See *Brewer*, app., *McGowen*, resp., Law Rep., 5 C. P. 239; *Smith v. Lancaster*, ib. 246.

(*h*) Sect. 4.

registration is an indispensable requisite to entitle the voter to the exercise of his franchise. The manner of registration is in general similar to that for counties (*i*). The electors, however, need not (except in the case of a lodger) make any *claim* of their right to vote, as is (in general) required in the case of county electors: their names are to be entered on the lists, whether any claim has been made or not (*k*). The lists are to be made out in general by the overseers of the poor, as in the case of counties (*l*), and, when settled by the revising barrister, are to be forthwith delivered to the town clerk for the borough, who is to provide a book, into which they are to be printed (*m*). This book is to be delivered over by the town clerk, on or before the last day of December in each year (*n*), to the returning officer of the borough, to be by him and his successors kept in safe custody: and it then becomes the register of electors entitled to vote at any election for the borough to which it relates, for the next succeeding year (*o*); but no person, though registered, is entitled to vote, unless his qualification as to *residence* shall have continued to the time of polling (*p*).

(*i*) Vide sup. p. 354. So also the provision contained in 17 & 18 Vict. c. 102 (sect. 6), noticed sup. p. 356, n. (*h*), in relation to county voters, applies equally to electors for boroughs.

(*k*) Any elector, however, whose name is omitted from the list, or who desires to be registered for a different qualification than that which therein appears, must give notice of his claim. 6 & 7 Vict. c. 18, s. 15.

(*l*) Sect. 13. The overseers are provided with the proper forms by the town clerk, or, if there be none, by the person appointed for the purpose by the returning officer. (Sect. 11.) The lists of

freemen (in places where there are those who vote as such) are, however, made out by the town clerks (see 5 & 6 Will. 4, c. 76, s. 4; 6 & 7 Vict. c. 18, ss. 13, 14; *The Queen v. Allday*, 7 Ell. & Bl. 799), and the "freemen and livery lists" in the city of London by the clerks of the different livery companies. 6 & 7 Vict. c. 18, s. 20.

(*m*) Sect. 48. If there is no town clerk, the delivery is to the returning officer.

(*n*) See 30 & 31 Vict. c. 102, s. 38.

(*o*) 6 & 7 Vict. c. 18, ss. 48, 49.

(*p*) *Ibid*.

Such is the substance of the present law with respect to the qualification of electors for counties and for boroughs generally considered: to which we will add such notice of their incapacities and restrictions in particular cases, as can be given without inconvenient detail. And of these, some apply to one class of voters, some to the other, and some to both without distinction.

1. First, then, no vote can be given by any but a man of full age, not subject to any legal incapacity(*s*); such, for example, as arises from being a lunatic, idiot, or outlaw in a criminal suit(*t*), or from having been convicted of perjury, felony(*u*), bribery, treating, or undue influence at any election(*v*). 2. No person can vote in right of any estate conveyed to him for the purpose of conferring the franchise, subject to a condition for defeating the conveyance when the object is accomplished. Moreover, the effect of such a transaction is to vest the estate absolutely in the grantee, and any person who executes or prepares the conveyance, or gives his vote under it, shall forfeit 40*l.*(*x*). 3. Only one person can be admitted to vote in respect of the same house or tenement(*y*). But this is only when a splitting of interests is made for election purposes, and in order to multiply votes: and the restriction consequently extends not to cases of *bonâ fide* joint occupation or tenancy; nor where there is a division by operation of law, as in descents(*z*); nor to the

(*s*) See 7 & 8 Will. 3, c. 25, s. 8; 2 Will. 4, c. 45, s. 19, &c. The word "man" does not here include a "female." See *Chorlton v. Lings*, Law Rep., 4 C. P. 374.

(*t*) *Semble*, see *Rogers, Elect. p. 162.*

(*u*) But a *pardon*, or the endurance of the punishment, restores competency. (See *Rogers, p. 161.*) *Secus* as to convict with ticket of

leave. (See 27 & 28 Vict. c. 47.)

(*v*) 17 & 18 Vict. c. 102, s. 6.

(*x*) 10 Anne, c. 23, s. 1.

(*y*) 7 & 8 Will. 3, c. 25, s. 7; 53 Geo. 3, c. 49.

(*z*) It has been said that the practice of splitting votes for election purposes, has not in modern times been viewed with the same jealousy as formerly. (*Rogers, Elect. p. 174.*)

lodger franchise conferred by the 30 & 31 Vict. c. 102. 4. No English peer can be allowed to vote at any election (*a*). 5. No metropolitan police magistrate can vote within his jurisdiction (*b*). 6. No person shall be entitled to be registered in any year as a voter in the election for a county (*c*), city or borough, who shall, within twelve calendar months next previous to the last day of July in that year, have received parochial relief, or disqualifying alms (*d*). 7. No person can vote at a *county* election in right of a house or other building, the occupation of which would (either separately or jointly with land occupied therewith) confer a vote in respect of the representation of any parliamentary *borough* under 2 Will. IV. c. 45, s. 27 (*e*); and this whether the right to vote for such borough, in respect of such building, shall have been actually acquired or not (*f*).

2. Next, as to the persons *to be elected* members of the house of commons. As to these there are certain restrictions and disqualifications, some of which depend upon the law and custom of parliament, declared by the house

(*a*) See Rogers, Elect. p. 162; 13 Com. Journ. 14 December, 1699. This point was again so decided by the Court of Common Pleas in the year 1872, on a claim to vote advanced by the Marquis of Salisbury.

(*b*) 2 & 3 Vict. c. 71, s. 6. There is a similar incapacity attaching to members of the metropolitan police force (see 10 Geo. 4, c. 44, s. 18); to the police of the city of London (2 & 3 Vict. c. xciv, s. vii), and to the rural police (2 & 3 Vict. c. 93, s. 9).

(*c*) 30 & 31 Vict. c. 102, s. 40. Prior to this enactment, disqualification by reason of the receipt of parochial relief, did not apply in

the case of a *county* voter.

(*d*) 2 Will. 4, c. 45, s. 36. As to the nature of the alms the reception of which disqualifies, see *R. v. Halesworth*, 3 B. & Ad. 717; *Hedon*, 25 Com. Journ. 275.

(*e*) See *Chorlton v. Johnson*, Law Rep., 4 C. P. 426.

(*f*) 2 Will. 4, c. 45, ss. 24, 25. To the above list of disqualifications, until recently, must have been added all *persons employed in the collection or management of her Majesty's revenues*, but the enactments on this subject contained in 22 Geo. 3, c. 41; 43 Geo. 3, c. 25, and 7 & 8 Geo. 4, c. 53, s. 9, were repealed by 31 & 32 Vict. c. 73.

of commons;—others upon particular statutes(*l*). And some of these, again, are in respect of personal incapacity or misconduct, and others in respect of holding some office or employment considered to be incompatible with a seat in parliament. 1. Among the *personal* disqualifications are being an English peer(*m*), an infant(*n*), a lunatic, an idiot(*o*), or having been convicted of treason or felony(*p*), or having been outlawed in a criminal prosecution(*q*). And to this it may be added, that under the Parliamentary Elections Act, 1868, any candidate who shall be reported by the judge to have known and consented to the commission of bribery at an election, and any other person found guilty of bribery, in any proceeding in which after notice of the charge he has had an opportunity of being heard, shall (among other consequences) be disqualified from serving in the house of commons for the period of seven years(*r*); and further that by the 32 & 33 Vict. c. 71 (ss. 120—124), when any member of the house of commons is adjudged bankrupt he is incapacitated for the space of one year from sitting or voting, unless the order of adjudication is annulled, or his creditors are fully paid or satisfied; and if at the expiration of such period the order be not annulled or his debts paid, his seat becomes vacant(*s*). 2. Among the *offices* or employments which incapacitate for a seat in parliament (and which are too numerous for complete enumeration in this work), we may specify the following persons

(*l*) 1 Bl. Com. p. 175. See 4 Inst. 47, 48.

(*m*) However, an *Irish* peer is eligible, unless he has been previously elected to serve in the House of Lords as a representative peer. (See 39 & 40 Geo. 3, c. 67, Art. 4.)

(*n*) Vide sup. p. 337.

(*o*) Com. Journ. 1623, 1625; Com. Dig. Parliament, D. 9; Sheph. Elect. 109.

(*p*) See 54 Geo. 3, c. 144, and Irish Act, 19 & 20 Geo. 3, c. 25, s. 9.

(*q*) Rogers, Elect. (8th ed.), p. 206.

(*r*) 31 & 32 Vict. c. 125, ss. 43, 45. See also 35 & 36 Vict. c. 33, s. 24, with regard to the offence of *personation*.

(*s*) This is a re-enactment of a similar provision in 52 Geo. 3, c. 144.

who are disqualified on this ground:—judges of the superior courts in England (*t*), or Ireland (*u*), judges of the English County Courts (*x*), or of the Court of Session or Exchequer in Scotland (*y*); officers of any court having jurisdiction in bankruptcy (*z*); clergy of the established Church of England, or ministers of the Scottish Church, or of the Church of Rome (*a*); metropolitan police magistrates (*b*); and (within their respective jurisdictions) sheriffs of counties, returning officers of boroughs (*c*), recorders (*d*), and revising barristers (*e*). To this list we may add any person who holds any new office or place of profit under the crown, created since 25th October, 1705 (*f*), and any person who holds a royal pension, either during pleasure or for a term of years (*g*). Moreover, by 22 Geo. III. c. 45, a disqualifi-

(*t*) Com. Journ. 9th Nov. 1605; 1 Bl. Com. 175. And see the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 9.

(*u*) 1 & 2 Geo. 4, c. 44.

(*x*) See 25 & 26 Vict. c. 99, s. 4, renewing a prohibition to the same effect, contained in 10 & 11 Vict. c. 102, s. 18.

(*y*) 7 Geo. 2, c. 16, s. 4.

(*z*) 32 & 33 Vict. c. 71, s. 69.

(*a*) 41 Geo. 3, c. 63, s. 4; 10 Geo. 4, c. 7, s. 9. Upon the controverted question as to the eligibility of clergymen prior to the 41 Geo. 3, c. 63, Blackstone inclined to the negative, assigning as the reason that the beneficed clergy are represented in *convocation*. But this reason, as has been justly remarked, is not satisfactory. (See Coleridge's Blackstone, vol. i. p. 175.) And the authorities were on the whole in favour of their eligibility. (See Case of the Borough of Newport, 2 Anders, 260.)

(*b*) 10 Geo. 4, c. 44, s. 18; 3 & 4

Will. 4, c. 19, s. 19. See also 2 & 3 Vict. c. xciv, s. 7, as to commissioners of city of London police.

(*c*) Bro. Ab. tit. Parliament, 7; 4 Inst. 48; Whitelocke of Parl. ch. 99, 100, 101; Com. Journ. 25th June, 1604; 14th April, 1614; 22nd March, 1620; 2nd, 4th and 15th June, 17th Nov. 1685; Hal. of Parl. 114; Rogers, Elect. (8th ed.), p. 185. As to Sheriff's substitute in Scotland, see 21 Geo. 2, c. 19, s. 11; 2 & 3 Will. 4, c. 65, s. 36.

(*d*) 5 & 6 Will. 4, c. 76, s. 103.

(*e*) 6 & 7 Vict. c. 18, s. 29.

(*f*) 6 Ann. c. 7, s. 25. See also 15 Geo. 2, c. 22; 22 Geo. 3, c. 82; 57 Geo. 3, cc. 62, 63, 84; Irish Act, 33 Geo. 3, c. 41. By 41 Geo. 3, c. 52, persons ineligible for England or Ireland are, since the Union, disqualified for the united parliament.

(*g*) 6 Ann. c. 7, and 1 Geo. 1, sess. 2, c. 56. See 22 & 23 Vict. c. 5, with regard to the eligibility of persons holding certain *diplomatic* pensions; and 32 & 33 Vict. c. 15,

cation attaches to persons holding any contract with government on account of the public service (*h*); though as to these there is an exception in the case of members of an incorporated trading company, and also a provision, that where the completion of any contract shall devolve on any person by descent or limitation, will or marriage, the incapacity shall not attach until twelve calendar months after he shall have been in possession of the same. Finally, by 6 Anne, c. 7, s. 26, any person already chosen a member of parliament (not being an officer in the army or navy accepting a new commission,) who should accept any office of profit from the crown, was made to vacate his seat thereby: though if the office were one created prior to 25th of October, 1705, he was rendered capable of being re-elected. And now, by 30 & 31 Vict. c. 102, s. 32, no vacation or necessity for re-election arises where a member has been returned since his acceptance of any of the offices mentioned below, merely by reason of his subsequent acceptance of some other office in that list in immediate succession the one to the other (*i*). Subject to these standing restrictions and disqualifications, every subject of the realm is eligible as a member of the

as to persons who hold *civil service* pensions or *superannuation allowances*.

(*h*) As to this provision, see Rogers on Elections, 10th ed., App. p. I, and *Boyce v. Birley*, Law Rep. 4 C. P. 296.

(*i*) The following are the offices referred to in the text: Lord High Treasurer; Commissioner for executing the offices of Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland; President of the Privy Council; Vice-President of the Committee of Council for Education; Comptroller, Treasurer and Vice-Chamberlain of her Majesty's Household; Equerry or Groom in Waiting on her Majesty;

any Principal Secretary of State; Chancellor and Under Treasurer of her Majesty's Exchequer; Paymaster-General; Postmaster-General; Lord High Admiral; Commissioner for executing the office of Lord High Admiral; Commissioners of her Majesty's Works and Public Buildings; President of the Board of Trade; Chief Secretary for Ireland; Poor Law Commissioner; Chancellor of the Duchy of Lancaster; Judge Advocate-General; Attorney-General for England or Ireland; Solicitor-General for England, Scotland or Ireland; Lord Advocate for Scotland. (30 & 31 Vict. c. 107, Sched. II.)

house of commons (*k*). [But there are instances wherein persons in particular circumstances have forfeited that common right: and have been declared ineligible for that parliament, by a vote of the house; or for ever, by an act of the legislature (*l*). It was, however, an unconstitutional prohibition which was grounded on an ordinance of the house of lords (*m*), and inserted in the king's writs for the parliament holden at Coventry, in the sixth year of Henry the fourth,—that no apprentice or other man of the law should be elected a knight of the shire therein (*n*). In return for which, our law books and historians have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament (*o*); and Sir Edward Coke observes, with some spleen, that there was never a good law made thereat (*p*).]

3. The third point, regarding elections, is the method of proceeding therein (*q*). This is also regulated by the law of parliament and the several statutes which have been passed relative to that subject; from all which, con-

(*k*) Blackstone (vol. i. p. 175) says, that formerly the rule was, that all members should be inhabitants of the places for which they were chosen (see 1 Hen. 5, c. 1; 23 Hen. 6, c. 15); but that this, having been long disregarded, was at length entirely repealed by 14 Geo. 3, c. 58. Qualifications were also, up to a recent period, required in regard to *property*, the changes on which subject have been as follows. Formerly the provision was, that all knights of the shire should be actual knights, or "such notable esquires and gentlemen as have estates sufficient to be knights, and by no means of the degree of yeomen." Afterwards the qualification was made to consist (without regard to rank or title) simply in real estate; which by sta-

tute 9 Ann. c. 5, was fixed at 600*l.* per annum of freehold or copyhold estate for a county member, and 300*l.* of the like estate for a burgess. Afterwards it was, by 1 & 2 Viet. c. 48, made to consist of the like value in *real* estate in these several cases, but with the admission of *personal* estate, or of real and personal combined, as an equivalent; and now by 21 & 22 Viet. c. 26, all property qualification is dispensed with.

(*l*) See, for example, 7 Geo. 1, st. 1, c. 28.

(*m*) 4 Inst. 10, 48; Pryn. Plea for Lords, 379; 2 Whitlocke, 359, 368.

(*n*) Pryn. on 4 Inst. 13.

(*o*) Walsingh. A.D. 1405.

(*p*) 4 Inst. 48.

(*q*) See Com. Dig. Parl. D. 11.

sidered in mass, shall be extracted a summary account of the method of proceeding as to elections in England and Wales (*r*).

As soon as the parliament is summoned the lord chancellor sends his warrant to the clerk of the crown in chancery (*s*): who thereupon issues out writs to the proper "returning officer" of each county or borough—that is to say, as the general rule, to the sheriff in case of a county, and the mayor in the case of a borough—commanding such officer to proceed in due course to the election. And the returning officer must, in the case of a county election, within two days after the day on which he receives the writ,—and in the case of a borough election on the day or on the day following the day on which he receives the same,—give public notice between 9 A.M. and 4 P.M. of the day and place of election, or for the poll if the election is contested, and of the time and place where forms of nomination papers may be obtained (*t*). Such day of election in the case of a county or district borough must not be later than the ninth day, and in the case of other boroughs than the fourth day, after that on which the writ is received; the place of election must be some convenient room in the town wherein the same is to be held; and the time must be during such two hours between the hours of 10 A.M. and 3 P.M. as shall be appointed by the returning officer (*u*).

A candidate for election is nominated in writing subscribed by two registered electors of the county (or borough) as proposer and seconder, and by eight other registered electors as assenting to the nomination (*x*); and if at the expiration of one hour after the time appointed for the election no more candidates stand nominated than there

(*r*) The principal statutes on this subject are the Reform Act (2 Will. 4, c. 45), the Registration Act (6 & 7 Vict. c. 18), the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and the Ballot Act,

1872 (35 & 36 Vict. c. 33), *2 C.P. 189*.

(*s*) Vide sup. p. 322.

(*t*) 35 & 36 Vict. c. 33, First Sched. (1).

(*u*) Ibid. (2), (3), (4).

(*x*) 35 & 36 Vict. c. 33, s. 1.

are vacancies to be filled up, such candidates are returned to the clerk of the crown in chancery as having been duly elected; but otherwise the returning officer shall adjourn the election until a future day, on which the poll shall be taken in due course (*y*).

Until quite recently the poll in a contested election was taken by each voter openly stating at the polling-booth the name of the candidate for whom he intended to vote; but, in the hope of thereby diminishing the temptation to corrupt voting and its attendant evils, an important change in this respect has now been made, though for the present only tentatively—the Ballot Act of 1872 (35 & 36 Vict. c. 33) having been passed only for a period of six years (*z*). But by its provisions, in the case of a poll at an election the votes are now given *by ballot* (*a*):—that is to say, by each voter handing in a ballot paper previously supplied to him, whereon are inscribed the names of each candidate, against one or more of which, as the case may require, the voter secretly puts a mark and places it in a closed box (*b*); and these ballot boxes having been taken charge of and examined by the returning officer, the result of the poll is ascertained by his counting the votes given to each candidate, and he then returns the name of such candidate or candidates, as the case may be, to whom the majority of votes have been given, to the clerk of the crown in chancery (*c*). *Pickering v James, 8 Q.B. 46*

In the case of an equality of votes, but not otherwise, the returning officer, if a duly registered elector, may himself give a vote (*d*).

(*y*) 35 & 36 Vict. c. 33, s. 1. As to the *polling districts*, see sect. 5.

(*z*) Sect. 33.

(*a*) Sect. 2.

(*b*) *Ibid*.

(*c*) *Ibid*. It may be here observed, that the system of voting provided by the Ballot Act, 1872, for parliamentary elections is, by

the same statute, applied also to contested *municipal* elections:—that is to say, elections whereat are chosen a councillor, auditor or assessor of any municipal borough. 35 & 36 Vict. c. 33, s. 29.

(*d*) Sect. 2. This provision does not apply in the case of a *municipal* election. (Sect. 20.)

Such is the course of proceeding towards a general election upon the summoning of a new parliament. In the case of a particular vacancy by death or otherwise, in an existing parliament, the course as regards the election for the particular place is the same, except that the warrant for the writ is given by the speaker, acting by order of the house; or supposing the vacancy to occur during a prorogation or adjournment, then by the speaker without any such order (*u*).

As to the elections for the Universities of Oxford, Cambridge, and London, (to which the provisions of the Ballot Act as to the manner of voting do not apply,) it was provided by 24 & 25 Vict. c. 53, with regard to the two first named, and by 30 & 31 Vict. c. 102, with regard to the last, that any elector therein shall be at liberty to record his vote without personal attendance at the poll, by means of a *voting paper*, signed by him and delivered in his behalf, to the Vice-Chancellor (*v*), or to his deputy, at one of the appointed polling places (*x*)—by some other elector of the same university, previously nominated for that purpose by the elector so voting (*y*). It has also been provided that the polling at any election for either of the Universities of Oxford, Cambridge, or London, shall not continue for more than five days at the most (*z*).

Besides the points hitherto noticed there are some others which require attention, and which are common to all elections in England or Wales, whether for counties or boroughs.

1. No person—as before shown (*a*)—is competent to vote unless his name appears on the register of electors (*b*);

(*u*) This subject is regulated by 24 Geo. 3, sess. 2, c. 26; 52 Geo. 3, c. 144; 21 & 22 Vict. c. 110; 26 & 27 Vict. c. 20.

(*v*) See 16 & 17 Vict. c. 68, s. 4; 30 & 31 Vict. c. 102, s. 41.

(*x*) As to the polling places for the Universities of Oxford and

Cambridge, see 16 & 17 Vict. c. 68, s. 5.

(*y*) See 31 & 32 Vict. c. 65.

(*z*) 16 & 17 Vict. c. 68, s. 4; 30 & 31 Vict. c. 102, s. 43.

(*a*) Vide sup. pp. 354, 363.

(*b*) 35 & 36 Vict. c. 33, s. 7.

but, on the other hand, the law does not permit the qualification of any person, who has been so registered, to be questioned at the time of polling (*c*). Nor is any inquiry whatever allowed to be made on that occasion, relative to the right of any person to vote, except only as follows,—that the sheriff or other returning officer shall (if required on behalf of any candidate to do so) put to the voter at the time of tendering his vote, and not afterwards, two questions (or either of them), worded in such manner as the act of parliament in that behalf prescribes (*d*),—the object of which is to ascertain, 1st, the identity of the proposed voter with the registered person in respect of whose qualification he proposes to vote; 2ndly, that the proposed voter has not already voted at that election (*e*). The voter may also (upon the like requisition) be put to his oath upon these matters (*f*). But the law provides, that no person claiming to vote shall be excluded from doing so, unless it appears upon his answers to the questions, that he is not entitled to vote; or unless he refuses to take such oath (*g*).

2. Though no person can vote unless his name be on the register, yet a person who has been excluded from the register by the revising barrister's decision, may nevertheless tender his vote at the election; and the returning officer is bound to enter it in the poll book as having been

(*c*) 6 & 7 Vict. c. 18, s. 79. See *Pryce v. Belcher*, 3 C. B. 58; 4 C. B. 866.

(*d*) 6 & 7 Vict. c. 18, s. 81. Analogous regulations are made for the university elections, in reference to objections to *voting papers*. (See 24 & 25 Vict. c. 53.)

(*e*) See *R. v. Thwaites*, 1 Ell. & Bl. 704; 35 & 36 Vict. c. 33, First Sched. (27).

(*f*) 6 & 7 Vict. c. 18, s. 82. By 2 Geo. 2, c. 24, and 43 Geo. 3, c. 74, an oath against *bribery* also

might be put to the voter; but these statutes have been repealed. (See 17 & 18 Vict. c. 102, Sched. A; 35 & 36 Vict. c. 33, Sched. 4.)

(*g*) See *R. v. Harris*, 7 Car. & P. 253; *R. v. Dodsworth*, 8 Car. & P. 218; 6 Vict. c. 18, s. 82; 35 & 36 Vict. c. 33. And see s. 24 of the Act last mentioned for provisions against *personation* of voters, which offence is made a felony punishable by imprisonment with hard labour to the extent of two years.

tendered, distinguishing, however, all votes so claimed from votes admitted. And in the event of a petition complaining of an undue election or return, the correctness of the register, either as to votes excluded or admitted, may be impeached before the judge before whom the trial of the petition is conducted; and the vote may be either allowed or rejected on such scrutiny, and the poll altered accordingly (*h*).

3. As it is essential to the very being of parliament that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited (*i*). It is accordingly provided, that on every day appointed for the nomination, or for the election, or for taking the poll for the election, of a member to serve in parliament, no soldier, within two miles of the city, borough or place where the nomination or election is to be declared or poll taken, shall be allowed to go out of the barracks or quarters in which he is stationed, unless for the purpose of mounting or relieving guard, or for giving his vote at such election. And every soldier allowed to go out for any such purpose, within the limits aforesaid, must return to his barracks or quarters with all convenient speed, as soon as his guard shall have been relieved or vote tendered. An exception, however, to this is allowed in the case of soldiers attending as guards to her majesty, or any of the royal family, and as to the soldiers usually stationed within the Bank of England (*j*). It has also been resolved by vote of the house of commons that no lord of parliament, or lord lieutenant of a county, hath any right

(*h*) See 31 & 32 Vict. c. 125, s. 26; *Ryder v. Hamilton*, Law Rep., 4 C. P. 559.

(*i*) 1 W. & M. st. 2, c. 2; 2 W. & M. sess. 1, c. 7; 9 Com. Journ. 191; 17 Journ. 507.

(*j*) 10 & 11 Vict. c. 21. The rule formerly was, that, as soon as the time and place for election were

fixed, all soldiers quartered in the place were to remove at least one day before the election to the distance of two miles or more, and not return till one day after the poll was ended. (8 Geo. 2, c. 30.) But this enactment, being found inconvenient, is now repealed by the statute above cited.

to interfere in the election of commoners; and by statute 2 W. & M. sess. 1, c. 7, the lord warden of the Cinque Ports shall not recommend any members there (*k*). Officers of the excise, customs, stamps and certain other branches of the revenue, as well as justices and officers appointed under the Metropolitan Police Acts, are also expressly prohibited, under heavy pecuniary penalties and loss of office, from any interference (*l*). Moreover, riots have been frequently determined to make an election void; and by the Reform Act of 1832 it was provided, that where, at any place of election, the proceedings are interrupted by riot, or open violence, the sheriff or returning officer shall adjourn the poll at such place till the following day; and, if necessary, shall then further adjourn the same until the interruption shall have ceased (*m*).

4. While the electors, however, of one branch of the legislature are thus secured from any undue influence from either of the other two, and from all external violence and compulsion, the greatest danger is that in which themselves co-operate, by the infamous practices of bribery and corruption (*n*). To prevent which, very careful provision has been now made by parliament itself. And in particular the 17 & 18 Vict. c. 102 (called “The Corrupt Practices. Prevention Act, 1854”) applies itself, in the first place to the offence of *bribery* (*o*); its definition of which is pointed principally against the gift or promise of money or valuable consideration, or the gift, procurement

(*k*) 1 Bl. Com. 179.

(*l*) Bl. Com. ubi sup.; 2 & 3 Vict. c. 71, s. 6. As to the right to *vote*, vide sup. p. 364.

(*m*) 2 Will. 4, c. 45, s. 70.

(*n*) Bl. Com. ubi sup.

(*o*) This Act is amended and continued by 21 & 22 Vict. c. 87; 26 & 27 Vict. c. 29; 33 & 34 Vict. c. 103; 35 & 36 Vict. c. 88, and 36 & 37 Vict. c. 75. Bribery was an offence also at the common law, punishable with fine and imprison-

ment (3 Bnrr. 1335, 1359; 4 Doug. 292). Blackstone says (vol. i. p. 179), that the first instance that occurs of election bribery is as early as 13 Eliz., when one Thomas Longe, being a simple man and of small capacity to serve in parliament, acknowledged that he had given the corporation by which he was returned, 4*l*. He was removed, and a fine of 20*l*. imposed on the corporation.

or promise of any office, place or employment, in order to induce a voter to vote or refrain from voting, or on account of his having already done so (*o*). And it enacts that such offence shall—both as regards him from whom the gift, procurement or promise proceeds, and him who agrees to vote for any money, valuable consideration, office, place or employment—amount to a *misdemeanor*. And in addition to the fine or imprisonment consequent on the misdemeanor, the offender, in the former case, shall be liable to forfeit 100*l.*, and in the latter 10*l.* (*p*). Secondly, the Act prohibits *treating*; its definition of which points in general at the providing by any candidate, before, during, or after an election, any meat, drink, entertainment or provision, in order corruptly to influence any person to vote or refrain from voting, or on account of his having done so; an offence which it visits, as regards the candidate, with the forfeiture of 50*l.*, and as regards the voter who accepts what is thus illegally provided, with the consequence that he shall be incapable of voting at that election, and that his vote, if given, shall be utterly void (*q*). Thirdly, the Act prohibits any *undue influence*; an offence which it defines in such manner as to comprise, generally, any force, violence or restraint, or the infliction of or threat to inflict any injury, or the practice of any intimidation, in order to induce any person to vote or refrain from voting, or on account of his having done so; and it enacts, that every person so offending shall be guilty of a misdemeanor, and forfeit the sum of 50*l.* (*r*). Moreover, the Act prohibits the providing by a candidate, either for any voter or for any inhabitant of the county, city or place, of any *cockade or other mark of distinction*, under a penalty of 2*l.* for every such offence (*s*); and also (under a similar

(*o*) See 35 & 36 Vict. c. 60, whereby “corrupt practices” at a *municipal* election are also sought to be restrained, and a tribunal established for the trial of such elections if impugned.

(*p*) 17 & 18 Vict. c. 102, ss. 2, 3.

(*q*) Sect. 4.

(*r*) Sect. 5. See *R. v. Barnwell*, 29 L. T. p. 107.

(*s*) Sect. 7.

penalty) the providing of *refreshment* to any voter on the day of nomination or of polling, on account of his having polled or being about to poll (*t*); and it further enacts, that all payments made on any such account, or on account of any *chairing, bands of music, flags or banners*, shall be deemed illegal payments within the Act (*u*). With a view also to the more effectual prevention of all such payments as it makes illegal, it provides for the annual appointment of certain officers, called *election auditors* (*x*), to whom is committed the duty of taking and publishing the account of all expenses incurred at elections (*y*). And it enacts, that no payment in respect of any election or the expenses thereof, shall be made by, or by authority of, any candidate, except by or through the election auditor for such election (*z*); and that any payment otherwise made shall be deemed illegal, and that upon proof thereof the candidate shall forfeit double its amount, with 10*l.* besides (*a*). An addition to the above offences in connection with elections has been now also made by the Representation of the People Act, 1867, whereby it is declared to be bribery if any person shall, either directly or indirectly, corruptly pay any rate on behalf of a rate-payer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election; or for the purpose of inducing a voter to vote or refrain from voting (*b*).

(*t*) 17 & 18 Vict. c. 102, s. 23.

(*u*) Sect. 7. So also by 30 & 31 Vict. c. 102, s. 36, payment of any money on account of the *conveyance of any voter to the poll*, either to the voter himself or any other person, is made an illegal payment under 17 & 18 Vict. c. 104,—except only in the case of the boroughs of *East Retford, Shoreham, Cricklade, Much Wenlock*, and *Aylesbury*. As to travelling expenses, see also 21 & 22 Vict. c. 87, s. 1; *Cooper v. Slade*, 6 H. of L. Cas. p. 746; *Simpson v. Yeentl*, Law Rep., 4 Q. B. 626.

(*x*) See 21 & 22 Vict. c. 87, ss. 2, 4.

(*y*) 17 & 18 Vict. c. 102, ss. 26—28. See *The Queen v. Griffiths*, 7 Ell. & Bl. 952; and *Edwards v. Whitehurst*, 5 H. & N. 131.

(*z*) See *Nurton v. Dickson*, 5 H. & N. 637.

(*a*) 17 & 18 Vict. c. 102, s. 18. As to who is to be deemed a “candidate,” see 21 & 22 Vict. c. 87, s. 3.

(*b*) 30 & 31 Vict. c. 102, s. 49. “Personation” is also made a corrupt practice within the meaning of this Act. (35 & 36 Vict. c. 33, s. 24).

The election being closed, the sheriff or other returning officer returns the writ, with the names of the persons elected by the majority (*c*), to the clerk of the crown in chancery, to whom also the poll-books are to be delivered, for their future safe custody (*d*). If the returning-officer wilfully delays, neglects or refuses duly to return any person who ought to be returned, he is liable to an action at the suit of the party aggrieved, in case it shall be determined on the hearing of an election petition, in manner to be presently described, that such party was entitled to have been returned: and provided also that such action be commenced within one year after the commission of the injury, or within six months after the conclusion of the trial relating to such election (*e*). In addition to which, we may observe, that it is provided by the Reform Act of 1832, that a returning officer or any other person wilfully contravening its provisions shall be liable to be sued by the party aggrieved thereby; in which action, the jury may find a verdict for such sum as they shall think just, to the extent of 500*l.* (*f*). But the members returned by the returning officer are the sitting members, until the return shall be declared false and illegal.

The form and manner of proceeding to impugn such return are now regulated by 31 & 32 Vict. c. 125 (the "Parliamentary Elections Act, 1868"), and are in substance as follows (*g*):—Any person who voted, or had a right to vote, at the election, or claiming to have had a right to be returned or elected, or alleging himself to

(*c*) See 23 Hen. 6, c. 14.

(*d*) 6 & 7 Vict. c. 18, s. 93.

(*e*) 31 & 32 Vict. c. 125, s. 43.

(*f*) 2 Will. 4, c. 45, s. 76. By 6 & 7 Vict. c. 18, s. 97, a similar action, with damages to the extent of 100*l.*, is given for the wilful breach of the provisions of that Act. (As to which, see *Pryce v. Belcher*, 3 C. B. 78; 4 C. B. 806.) See also 30 & 31 Vict. c. 102, s. 30.

(*g*) This Act was further continued by 36 & 37 Vict. c. 75. As to its construction, see *Pease v. Norwood*, Law Rep., 4 C. P. 235; *Waygood v. James*, ib. 361; *Stevens v. Tillet*, ib., 6 C. P. 147. General rules for carrying the Act into effect were issued in Michaelmas Term, 1868, and will be found in the Law Rep. 4 C. P.

have been a candidate thereat,—may (within the period of twenty-one days after the return, or in case of an alleged corrupt payment, then within twenty-eight days after the date of such payment) subscribe and present to the Common Pleas (*h*) a petition, complaining of an undue return or election, and such petition shall thereupon be served by the petitioner on the respondent, that is to say, on the candidate or candidates who have been returned (*i*). But it is required that the petitioner shall give security to the amount of one thousand pounds for payment of all costs, charges and expenses (*j*). The trial of such a petition is conducted before a common law judge, and is tried by him sitting in open court, without a jury, and as the general rule in the borough or county, the election whereat has been impugned (*k*). At the conclusion of the trial (at which witnesses are examined on oath) the judge determines whether the member whose return or election is complained of, or any or what other person was duly returned or elected, or whether the election was void, and certifies the same in writing to the Speaker, and such determination is final to all intents and purposes; and is carried into execution by the directions of the house as to confirming or altering the return, or issuing a writ for a new election, as circumstances may require (*l*). There is, however, a proviso, that, if it shall appear to the judge on such trial that any questions of law as to the admis-

(*h*) Prior to this Act, the petition was presented to the House of Commons itself, and was disposed of before a select committee of the House under the provisions of 11 & 12 Vict. c. 98, and 28 & 29 Vict. c. 8, both of which are repealed by 31 & 32 Vict. c. 125.

(*i*) 31 & 32 Vict. c. 125, s. 5.

(*j*) Sect. 6. As to the principles on which the costs on such petitions are assessed, see *Hill v. Peel*, Law

Rep., 5 C. P. 172; *Hughes v. Meyrick*, ib. 407.

(*k*) The judges are by the Act directed, on or before the third day of Michaelmas term in every year, to select by a majority of votes one of their number to be placed on the rota for the trial of election petitions during the ensuing year (31 & 32 Vict. c. 125, s. 11).

(*l*) Sect. 13.

sibility of evidence or otherwise require further consideration by the court in banc, it shall be lawful for him to postpone the grant of his certificate until the court has determined such questions (*m*). And where any charge is made in the petition of any corrupt practice having been committed at the election the judge shall, in addition, certify as to the same, or make any special report such as the occasion may require (*n*):—in which case the house of commons may make such order in respect of such special report as they shall think proper (*o*). And on a report by the judge that bribery has been committed, either by a candidate (personally, or through an agent with his knowledge and consent), or by any other person, the guilty party shall be incapable during the next seven years of being elected to and sitting in parliament (*p*); and shall also be incapable of being registered, or voting, as a parliamentary voter, at any election in the United Kingdom, or of holding certain offices—including any municipal or judicial office,—or of being appointed justice of the peace (*q*).

We may remark here, that under the provisions of the 15 & 16 Vict. c. 57 (as amended by the 31 & 32 Vict. c. 125, s. 56), where it has been represented to her Majesty, by a joint address of both houses of parliament, that there is reason to believe that corrupt practices have extensively prevailed in any county, borough or other

(*m*) 31 & 32 Vict. c. 125, s. 12.

(*n*) Sect. 11. With regard to the *witnesses* at the trial of the petition, it may be noticed that under this Act they are made entitled not only to their reasonable expenses, but also to an *indemnity*. (Sects. 33, 34.)

(*o*) Sect. 14.

(*p*) If any candidate be found by the report to have been guilty, or to have abetted the offence of *personation*, he shall be thereby disqualified, in addition to other

punishment, from sitting in parliament for the county or borough during the parliament then in existence. (35 & 36 Vict. c. 33, s. 24.)

(*q*) Sects. 43, 45. By 34 & 35 Vict. c. 77, certain persons having been reported to the House as having been guilty of bribery at an election for a borough, such persons were by name severally prohibited from voting *at any time* at any parliamentary election for such borough.

place sending a member or members to parliament, her Majesty may appoint commissioners to make inquiry into the alleged practices, and where their report has been unfavourable, the place in question has, by act of parliament, been deprived permanently or for a time of its right to send members to parliament (*r*).

When a member is once duly elected, and has been duly sworn (*s*), he is compellable to discharge the duties of the public trust thus conferred upon him; and is bound to be present at every call of the house, unless he can show such cause as shall be deemed a sufficient excuse for his non-attendance. Nor is he enabled by law to resign his seat. The only way of relinquishing it is to obtain some office, such as will have the effect of making the seat void. This, however, is now done as a matter of course; it having long been usual for the crown to grant to any member wishing to vacate his seat the stewardship of the Chiltern Hundreds,—which, though merely nominal, is by the practice of parliament considered as an office sufficient for that purpose (*t*).

And this abstract of the law of election concludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

(*r*) This course was taken with regard to the boroughs mentioned sup. p. 334, n. (*p*). As to the practice pursued at such inquiries, see Fitzgerald's Case, Law Rep., 5 Q. B. 1; S. C., ib., 5 Exch. 21. As to certificates of indemnity given to witnesses by such commissioners, see *The Queen v. Hulme*, Law Rep., 5 Q. B. 377; *The Queen v. Price*, ib., 6 Q. B. 411. As to the expenses of such inquiries, see 32 & 33 Vict. c. 61, continued by 36 & 37 Vict. c. 75.

(*s*) Vide sup. p. 338.

(*t*) 2 Hats. 41. It is said by Mr.

Hatsell that this practice is believed to have begun not earlier than about the year 1750, and that it would be difficult, from the form of appointment to the Chiltern Hundreds, to show that it is an office. The stewardships of the manors of East Hendred, Northstead, or Hempsholme, are usually granted for this purpose, when the Chiltern Hundreds are occupied. (See May, Parl. Pract. 3rd ed. p. 458.) An Irish member accepts the office of "excheator of Munster," see 21 & 22 Vict. c. 110, s. 4.

VI. [We proceed now to the method of making laws,—which is much the same in both houses. But first it must be premised, that, for dispatch of business, each house of parliament has its *speaker*. The speaker of the house of lords—whose office it is to preside there, and manage the formality of business—is the lord chancellor, or keeper of the great seal, or any other appointed by royal commission: and, if none be so appointed, the house of lords (it is said) may elect. The speaker of the house of commons is chosen by the house (*u*); but must be approved by the sovereign (*v*). And herein the usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house (*x*); but the speaker of the house of lords, if a lord of parliament, may. In each house the act of the majority binds the whole, and this majority is declared by votes openly and publicly given; not privately or by ballot. This latter method may be serviceable to prevent intrigues and unconstitutional combinations; but it is impossible to be practised with us, at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.]

It is to be observed, that in the house of commons the speaker never votes, except when the votes of the house are otherwise equal; and in such cases he has a vote which determines the majority (*y*). The speaker of the

(*u*) Com. Dig. Parl. E. 5. As to his salary, &c., see 30 Geo. 3, c. 10; 2 & 3 Will. 4, c. 105; 4 & 5 Will. 4, c. 70. As to the performance, by a *deputy* speaker, of certain duties of the speaker during the temporary absence of the latter, see 18 & 19 Vict. c. 84.

(*v*) Sir Edward Coke, upon being elected speaker in 1592, in his address to the throne, declared, "this is only as yet a nomination, and

"no election, until your majesty "giveth allowance and approbation." (2 Hats. 164.) But the house of commons at present, says Mr. Christian (1 Bl. Com. p. 181), would scarce admit their speaker to hold such language.

(*x*) But when the house resolves itself into a committee, the case is otherwise. Vide post, p. 385.

(*y*) See May's Parl. Pr. (3rd ed.) p. 288.

house of lords, on the other hand, has his vote counted with the rest of the house; and in case of an equality of voices, the rule is that the negative opinion prevails (z).

[To introduce a bill in either house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then, (or otherwise, upon the mere petition,) leave is given to bring in the bill (a). And in the house of lords, if the bill begin there, it is (when of a private nature) referred to two of the judges, to examine and report the state of facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety.] In public matters, a bill originating in the commons is brought in upon motion made to the house for leave to bring it in, and there is no petition for that purpose; but there are many “standing orders” relative to the introduction of either public and private bills, and of too minute a nature to be detailed in this place (b). [Formerly, all bills were drawn in the form of petitions to the crown (c), which were entered upon

(z) See 33 Lords’ J. 519; 14 Lords’ J. 167, 168.

(a) Com. Dig. Parl. G. 11; 41 Geo. 3, c. 105.

(b) See 7 Will. 4 & 1 Vict. c. 83, as to the deposit of *plans and documents* in the case of private bills;—14 & 15 Vict. c. 49 (repealing 11 & 12 Vict. c. 129), as to the *preliminary inquiries* to be made on all applications for local Acts affecting navigation;—10 & 11 Vict. c. 69; 12 & 13 Vict. c. 78; 28 & 29 Vict. c. 27; and 34 & 35 Vict. c. 3, as to *costs* on private bills. As to the

power of committees of the house to administer oaths to witnesses, see 34 & 35 Vict. c. 83.

(c) The commons, for nearly two centuries, continued the style of very humble petitioners. Their petitions frequently began with “Your poor commons beg and pray,” and concluded with “for God’s sake, and “as an act of charity;”—“*Les poveres communes prient et supplient, pur Dieu et en œuvre de charité.*” (Rot. Parl. passim.) And it appears that, prior to the reign of Henry the fifth, it had been the

[the *parliament rolls*, with the king's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case required (*d*): and, at the end of each parliament, the judges drew them into the form of a statute, which was entered on the *statute rolls*. In the reign of Henry the fifth, to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and, in the reign of Henry the sixth, bills in the form of acts, according to the modern custom, were first introduced.] The style now used in an act of parliament, is as follows:—"Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same."

[Supposing the bill to commence in the house of commons and to be of a public nature, the persons directed to bring in the bill present it in a competent time to the house drawn out in a proper form (*e*). The bill is read a

practice of the kings to add and enact more than the commons petitioned for. In consequence of this (remarks Mr. Christian, 1 Bl. Com. p. 181) there is a very memorable petition from the commons in 2 Hen. 5, which states that it is the liberty and freedom of the commons that there should be no statute without their assent, considering that they have ever been as well assenters as petitioners; and therefore they pray that, for the future, there may be no additions or diminutions to their petitions. And in answer to this, the king granted that from henceforth they should be bound in no instance without their assent, save his royal prerogative to grant and deny what he pleased of their petitions. (Ruff. Bref. xv.; Rot. Parl. 2 Hen. 5, No. 22.)

(*d*) See, among numberless other instances, the *articuli cleri*, 9 Edw. 2. As to the antient form of our statutes, much information will be found in Hist. Eng. Law, by Reeves, vol. i. p. 215; vol. ii. pp. 142, 153, 354; vol. iii. pp. 143, 252, 379; vol. iv. pp. 111, 130, 411.

(*e*) See 13 & 14 Vict. c. 21 (often called Lord Romilly's Act) as to shortening the language used in acts of parliament, the manner of citing former statutes, and the interpretation of words. We may also notice here, that, in order to avoid the necessity of repeating in many different Acts, the various provisions usually introduced into such as authorize the execution of undertakings of a public nature by companies and others,—and also in order to secure uniformity,—those provi-

[first time and then ordered to be printed; and at a convenient distance it is read a second time: and after each reading the speaker opens to the house the substance of the bill, and puts the question, whether it shall proceed any further (*f*). The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and if the opposition succeeds, the bill must be dropped for that session; as it must also, if opposed with success in any of the subsequent stages (*g*).

After the second reading it is *committed*, that is, referred to a committee; which is either selected by the house, or else the house resolves itself into a committee of the whole house (*h*). A committee of the whole house is composed of every member; and, to form it the speaker quits the chair (another member being appointed chairman), and may then sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modelled. After it has gone through the committee the chairman reports it to the house, with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment.] When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be reprinted (*i*); and it is then read a third time, and amendments are sometimes made to it at this stage also, and new clauses

sions are now consolidated into several Acts; and into any subsequent statute passed in reference to such undertakings, one or more of such "Consolidation Acts," or certain of their clauses (as the case may require), are incorporated by reference.

(*f*) Com. Dig. Parl. G. 12, 13, 14.

(*g*) Ibid. G. 15.

(*h*) Ibid. G. 13.

(*i*) 90 Com. J. 337; 105 Ibid. 372. At this stage of the proceedings the former practice was to *engross* the bill on one or more pieces of parchment. But this was discontinued in 1849. See May, Parl. Pr. (3rd edit.), p. 382. And see, per Willes, J., *Claydon v. Green*, Law Rep., 3 C. P. 521.

added (*j*). The speaker then again opens the contents, and, holding it up in his hands, puts the question, whether the bill shall pass (*k*). If this is agreed to, the title to it is then settled; and this used to be a general one for all the Acts passed in the session, till, in the time of Henry the eighth, distinct titles were introduced for each chapter (*l*). [After this the bill is printed fair by the Queen's printer, and one of the members is directed to carry it to the lords, and desire their concurrence. And the member thus deputed, attended by several more, carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woolsack to receive it.

It there passes through the same forms as in the other house, and, if rejected, no more notice is taken; but the matter passes *sub silentio*, to prevent unbecoming alterations. But if it is agreed to, the lords send a message, (which upon matters of high dignity or importance is conveyed by two of the judges,) that they have agreed to the same; and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill, to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who, for the most part, settle and adjust the difference; but if both houses remain inflexible, the bill is dropped (*m*). If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords (*n*). And when both houses have done with any

(*j*) Noy, 84.

(*k*) 1 Bl. Com. p. 183.

(*l*) Bl. Com. ubi sup. It is said that this custom first began in the fifth year of Henry the eighth. (Hist. Eng. Law by Reeves, vol. iv. p. 412.)

As to the title being no part of the Act, vide sup. vol. I. p. 69, n. (*h*).

(*m*) Com. Dig. Parliament, G. 24.

(*n*) No motion or permission to present the bill, however, is here necessary,—every peer being at

[bill, it always is deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which, after receiving the concurrence of the lords, is sent back to the house of commons (*o*).

The royal assent may be given either in person or by commission: 1. In person: when the sovereign comes to the house of peers, and, sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the sovereign's answer is declared by the clerk of the parliament in Norman-French (*p*); a badge (it must be owned), now the only one remaining, of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the sovereign consents to a public bill, the clerk usually declares "*le roy*" (or *la reine*) *le veut*;" if to a private bill, "*soit fait comme il est désiré*." If the sovereign refuses his assent, it is in the gentle language of "*le roy* (or *la reine*) *s'avisera*" (*q*). When a bill of supply is passed, it is carried up and pre-

liberty to present a bill and lay it on the table of the house. See May, Parl. Pr. (3rd ed.) p. 363.

(*o*) Com. Journ. 24th July, 1660. When an act of grace or pardon is passed, it is first signed by the sovereign, and then read once only in each of the houses, without any amendment. D'Ewes' Journ. 20, 73; Com. Journ. 17th June, 1747.

(*p*) The language of the statutes prior to the reign of Richard the third, is generally Latin or French. (See Christian's Blackstone, vol. i. p. 184.) But all Richard the third's statutes are in English, and so they have continued to be drawn in all subsequent periods.

(*q*) The words *le roi s'avisera* correspond to the phrase formerly

used by courts of justice, when they required time to consider of their judgment, viz. *curia advisari vult*. And there can be little doubt but originally the phrase implied a serious intent on the part of the sovereign, to take the subject under consideration. The last occasions on which the prerogative of rejecting bills was exerted, were in the year 1692, by William the third, who at first refused his assent to the bill for triennial parliaments, but was prevailed upon to permit it to be enacted two years afterwards (De Lolme, Const. of Eng. p. 404); and in 1707, when Queen Anne refused her assent to a Scotch militia bill. (18 Lords' Journ. 506.)

[sented to the sovereign by the speaker of the house of commons (*r*); and the royal assent is thus expressed, “*le roy (or la reine) remercie ses loyal subjects, accepte leur benevolence, et aussi le veut.*” In case of an Act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject: “*les prelates, seigneurs, et commons, en ce present parlement assemblés, au nom de tous vous autres subjects, remercient très humblement votre majesté, et prient à Dieu vous donner en santé bone vie et longue*” (*s*). 2. By commission: for by the statute 33 Henry VIII. c. 21, the king was enabled also to give his assent by letters-patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. And when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament (*t*).] To this it may be added, that, by the 33rd Geo. III. c. 13, the clerk of parliament is directed to indorse on every Act, immediately after the title thereof, the day, month, and year when the same shall have passed, and shall have received the royal assent; and such indorsement shall be taken to be part of the Act, and shall be the date of its commencement, where no other commencement shall have been provided (*u*).

[This statute or Act is placed among the records of the kingdom, there needing no formal promulgation to give it the force of a law, (as was necessary by the civil law with regard to the emperor's edicts,) because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, the Queen's printer is

(*r*) Rot. Parl. 9 Hen. 4, in Pryn.;
4 Inst. 22, 28.

(*s*) D'Ewes' Journ. 35. But see
May, Parl. Pr. 372.

(*t*) See *R. v. Justices of Middlesex*, 2 B. & Ad. 818.

(*u*) As to the law with respect to the time when a statute begins to operate, see also, sup. vol. i. p. 72.

[bound, by virtue of his office, to print each Act for the information of the whole land (*x*). And, formerly, before the invention of printing, it was used to be published by the sheriff of every county, the king's writ being sent to him at the end of every session, together with a transcript of all the Acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publicè proclamari, et firmiter teneri et observari faciat.*" And the usage was to proclaim them at the county court of the sheriff, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the seventh (*y*).

An act of parliament thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the sovereign himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament; for it is a maxim in law, that it requires the same strength to dissolve as to create an obligation. It is true it was formerly held, that the sovereign might in some cases dispense with penal statutes (*z*); but now by statute 1 W. & M. sess. 2, c. 2, it is declared

(*x*) 104 Com. Journ. 51. *Public* statutes (as to which vide sup. vol. I. p. 69) need no proof in courts of justice, being judicially noticed (see Tay. on Ev. ss. 5, 1368); and by 41 Geo. 3, c. 90, s. 9, copies of Acts of Great Britain and Ireland, printed by the king's printer prior to the Union, are made conclusive evidence of the Act, as between the two countries. It may also be observed, that by 8 & 9 Vict. c. 113, ss. 3, 4, all copies of private Acts, and of the journals of either house, if purport-

ing to be printed by the printers to the crown or either house of parliament, shall be admitted as evidence thereof. Moreover, if any person shall print such documents, falsely purporting to be printed by the crown or parliament printer, or shall knowingly tender the same in evidence, he shall incur the penalties of felony. (See 24 & 25 Vict. c. 98, s. 29.)

(*y*) 3 Inst. 41; 4 Inst. 26.

(*z*) Finch's L. 82, 234; Bacon's Elem. c. 19.

[that the suspending or dispensing with laws by regal authority, without consent of parliament, is altogether illegal (*a*).

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved (*b*).

An *adjournment* is no more than a continuance of the session from one day to another, as the word itself signifies; and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other (*c*). It hath also been usual, when the sovereign hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the royal pleasure so signified, and to adjourn accordingly (*d*). Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow: which would often be very inconvenient to both public and private business: for a prorogation puts an end to the session; and then such bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.]

A *prorogation* is the continuance of the parliament from one session to another, as an adjournment is a continuation of the session from day to day. This is done by the royal authority alone—usually expressed by the lord chancellor in the presence of, or by commission from,

(*a*) As to statutes and the rules relative to their construction, see also sup. vol. I. pp. 68—80.

(*b*) Com. Digest, Parliament, N.

O. P.

(*c*) 4 Inst. 28.

(*d*) Com. Journ. passim; e. g.

11th June, 1572; 21st May, 1768.

the crown, or else by proclamation (*e*). And by a recent statute, the 30 & 31 Vict. c. 81, such last mode of announcing the royal intention is expressly made sufficient notice thereof, provided the day of prorogation be to some day not less than fourteen days from the day for which parliament then stood summoned or prorogued; and provided also that the prorogation be not at the close of a session, to which case the Act is not to apply. [Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end until a prorogation; though, unless some Act were passed or some judgment given in parliament, it would in truth be no session at all (*f*).] And formerly the usage was, for the sovereign from time to time to give the royal assent to all such bills as he approved, and then to prorogue the parliament; though sometimes only for a day or two, and thus end the session (*g*); which custom obtained so strongly, that it was at one time made a question whether giving the royal assent to a single bill did not of course put an end to the session (*h*). [And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. I. c. 7, was passed to declare that the king's assent to that and some other Acts should not put an end to the session. And, even afterwards in the reign of Charles the second we find a proviso frequently tacked to a bill, that his majesty's assent thereto should not determine the session of parliament (*i*). But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session.] The prorogation is

(*e*) See 1 Bl. Com. by Christian, p. 186, where it is remarked, that when it is intended that parliament should meet upon the day to which it stands prorogued *for dispatch of business*, notice to that effect is given by proclamation.

(*f*) 4 Inst. 28; Hale of Parl. 38; Hut. 61.

(*g*) Com. Journ. 21st Oct. 1553.

(*h*) Ib. 21st Nov. 1554.

(*i*) See, for example, stat. 12 Car. 2, c. 1; 22 & 23 Car. 2, c. 1.

to a day fixed. But by the joint effect of the 37 Geo. III. c. 127, the 39 & 40 Geo. III. c. 14, and "The Meeting of Parliament Act, 1870" (33 & 34 Vict. c. 81), the sovereign may now at any time, without regard to the period to which parliament may stand prorogued or adjourned, appoint it to re-assemble for dispatch of business at the expiration of six days from the date of the proclamation.

A *dissolution* is the civil death of the parliament; and this may be effected three ways (*l*).

1. [A parliament may be dissolved by the sovereign's will, expressed either in person or by representation: for as he has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) either prorogue the parliament for a time, or put a final period to its existence. If none but itself had a right to prorogue or dissolve a parliament, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power; as was fatally experienced by the unfortunate King Charles I., who, having unadvisedly passed an Act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power which he himself had consented to give it.]

2. Until recently it was the rule that any parliament in being was dissolved by the demise of the crown. And, by the common law, this dissolution happened immediately upon the death of the reigning sovereign; for he being considered in law as the head of the parliament (*caput, principium, et finis*), that failing, the whole body was held to be extinct (*m*). But the calling a new par-

(*l*) Com. Dig. Parl. 1, 2.

(*m*) 1 Bl. Com. p. 188. So appointments held under the crown were at common law, in general, extinct on the demise of the

sovereign, Bac. Ab. Courts, (C.); but by 1 Geo. 3, c. 23, the commissions of the judges are continued, notwithstanding that event; and by 7 & 8 Will. 3, c. 27, s. 21,

liament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being, in case of a disputed succession, it was enacted by 6 Ann. c. 7 (*n*), that the parliament in being should continue for *six months* (but no longer) after the demise of the crown, unless sooner prorogued or dissolved by the successor;—and that, if it were at the time of such demise separated by adjournment or prorogation, it should re-assemble immediately. It was also enacted by 37 Geo. III. c. 127, that in case of such demise between a dissolution and the day appointed by the writs of summons for the meeting of a new parliament the last preceding parliament should immediately convene for six months, unless sooner prorogued or dissolved by the succeeding sovereign; and that in the event of such demise on or after the day appointed for assembling the new parliament, but before it had in fact assembled, then the new parliament should in like manner convene for six months, unless sooner prorogued or dissolved. The law on this subject, however, is now further regulated by the 30 & 31 Vict. c. 102, s. 51, which enacts, that (anything in the 6 Ann. c. 7, notwithstanding) “the parliament in being at any future demise of the crown shall not be determined or dissolved by such demise, but shall continue so long as it would have continued but for such demise, unless sooner prorogued or dissolved by the crown.”

3. [Lastly, a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual, or might last for the life of the prince who con-

1 Ann. st. 1, c. 8, 4 Ann. c. 8, s. 8, 6 Ann. c. 7, s. 8, all appointments under the Crown are in general now continued for six months after the demise; and by 11 Geo. 4 & 1 Will. 4, c. 43, no fees or stamp duties shall be charged on the renewal of them.

As to appointments in the British possessions abroad, see 1 Will. 4, c. 4.

(*n*) 1 Bl. Com. p. 188. See also 7 & 8 Will. 3, c. 15, repealed by 30 & 31 Vict. c. 59.

[vened them, (as formerly,) and were so to be supplied by occasionally filling the vacancies with new representatives,—in these cases, if it were once corrupted, the evil would be past all remedy; but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly, also, which is sure to be separated again, (whereby its members will themselves become private men, and subject to their full extent to the laws which they have enacted for others,) will think itself bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. & M. c. 2, was *three* years(*o*); after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I. st. 2, c. 38—in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government, then just recovering from the late rebellion—this term was prolonged to *seven* years; and, what alone is an instance of the vast authority of parliament, the very same house that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by the royal prerogative.]

(*o*) Before the Triennial Act, the duration of parliament was only limited by the pleasure or death of

the king. (Christian's Blackstone, vol. i. p. 189.)

CHAPTER II.

OF THE SOVEREIGN, IN HIS GENERAL RELATION TO
THE PEOPLE; AND THE LAW OF SUBJECT AND
ALIEN.

THE supreme executive power of this kingdom is vested by our laws in a single person, the king or queen; for it matters not to which sex the crown descends, but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power, as is declared by statute 1 Mar. st. 3, c. 1 (*a*).

In discoursing of the royal rights and authority, it is proposed to consider the sovereign under several distinct aspects. First, With regard to the relation which he bears to his people in general. Secondly, With regard to his title. Thirdly, With regard to the royal family. Fourthly, With regard to his councils. Fifthly, With regard to the prerogative. Sixthly, With regard to the royal revenue. Seventhly, With regard to the royal forces.

And, first, with regard to the relation between the sovereign and the people, we may remark that there exist between them the mutual duties of protection and subjection.

[These reciprocal duties are what were meant by the convention in 1688, when it declared that King James had broken the *original contract* between king and people. But however, as the terms of that original contract were in some measure disputed,—being alleged to exist principally in theory, and to be only deducible by reason and

(*a*) 1 Bl. Com. p. 190.

[the rules of natural law, in which deduction different understandings might very considerably differ,—it was, after the Revolution, judged proper, to declare these duties expressly, and to reduce that contract to a plain certainty. So that whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such a contract, they must now entirely cease; especially with regard to every prince who hath reigned since the year 1688.

The principal duty then of the sovereign is to govern his people according to law. *Nec regibus infinita aut libera potestas*, was the constitution of our German ancestors on the continent (*a*). And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. “The king,” saith Bracton, who wrote under Henry the third, “ought not to be subject to man, but to God, and to the law; for the law maketh the king. Let the king therefore render to the law, what the law has invested in him with regard to others; dominion and power: for he is not truly king, where will and pleasure rule, and not the law” (*b*). And, again, “the king also hath a superior, namely God, and also the law, by which he was made a king” (*c*). Thus Bracton: and Fortescue also, having first well distinguished between a monarchy, absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent, (of which last species he asserts the government of England to be,) immediately lays it down as a principle, that the king of England “must rule his people according to the

(*a*) Tac. de Mor. Germ. c. 7.

(*b*) L. 1, c. 8.

(*c*) L. 2, c. 16, s. 3. This is also well and strongly expressed in the Year Books, “*La ley est le plus*

haute inhéritance que le roy ad; car par la ley il même et tous ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inhéritance sera.”—19 Hen. 6, 63.

[“ decrees of the laws thereof ; insomuch that he is bound, “ by an oath at his coronation, to the observance and “ keeping of his own laws” (*d*). But to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 & 13 Will. III. c. 2, “ that the laws “ of England are the birthright of the people thereof ; and “ all the kings and queens who shall ascend the throne “ of this realm ought to administer the government of the “ same according to the said laws : and all their officers “ and ministers ought to serve them respectively according “ to the same : and therefore all the laws and statutes of “ this realm, for securing the established religion, and the “ rights and liberties of the people thereof, and all other “ laws and statutes of the same now in force, are ratified “ and confirmed accordingly.”

And, as to the terms of the original contract between king and people, these may be said to be now couched in the coronation oath, which, by the statute 1 W. & M. sess. 1, c. 6, is to be administered to every king and queen who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people ; who, on their parts, do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms :—

The archbishop or bishop shall say,—“ Will you “ solemnly promise and swear to govern the people of “ this kingdom of England, and the dominions thereto “ belonging, according to the statutes in parliament “ agreed on, and the laws and customs of the same ?”

The king or queen shall say, “ I solemnly promise so to “ do.”—*Archbishop or bishop*, “ Will you to your power “ cause law and justice, in mercy, to be executed in all “ your judgments ?” *King or queen*, “ I will.”—*Archbishop or bishop*, “ Will you to the utmost of your power “ maintain the laws of God, the true profession of the

[“gospel, and the protestant reformed religion established
 “by the law? And will you preserve unto the bishops
 “and clergy of this realm, and to the churches committed
 “to their charge, all such rights and privileges as by law
 “do or shall appertain unto them, or any of them?”—
King or queen, “All this I promise to do.”—*After this
 the king or queen, laying his or her hand upon the holy
 Gospels, shall say*, “The things which I have here before
 “promised I will perform and keep; so help me God:”
and then shall kiss the book.

This is the form of the coronation oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as antient as the *Mirroure of Justices*(*e*), and even as the time of Bracton(*f*); but the wording of it was changed at the Revolution, because (as the statute alleges) the oath itself had been framed in doubtful words and expressions, with relation to antient laws and constitutions at this time unknown(*g*). However, in what form soever it be conceived, this is most indisputably a fundamental and original express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation, as after; in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether or no he ever takes it at all. The present form of the coronation oath expresses (we may observe) all the duties that a monarch can owe to his people: viz. to govern according to law; to execute judgment in mercy; and to maintain the established religion.] And, with

(*e*) Cap. 1, s. 2.

(*f*) L. 3, tr. 1, c. 9.

(*g*) In the old folio abridgment of the statutes, printed by Lettoun and Machlinia in the reign of Edward the sixth, there is preserved a copy of the old coronation oath, which is given by Blackstone in a

note to p. 236 of his first volume. Blackstone adds that Prynne has also given us a copy of the coronation oaths of Richard the second (*Signal Loyalty*, ii. 246); Edward the sixth (*ibid.* 251); James the first and Charles the first (*ibid.* 269).

respect to the last of these three branches, we may further notice some auxiliary provisions. 1. That by the Bill of Rights, 1 W. & M. sess. 2, c. 2, and the Act of Settlement, 12 & 13 Will. III. c. 2, every king and queen regnant of the age of twelve years, either at their coronation, or on the first day of the first parliament, (whichever event shall first happen,) upon the throne in the house of peers, shall repeat and subscribe the declaration against Popery, according to 30 Car. II. st. 2, c. 1. 2. [That by the act of union with Scotland, 5 Ann. c. 8, two preceding statutes are recited and confirmed; the one of the parliament of Scotland, the other of the parliament of England; which enact—the former, that every king, at his accession, shall take and subscribe an oath to preserve the Protestant religion and Presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of England as by law established (*h*).]

It is a maxim in the law, that protection and subjection are reciprocal (*i*); and therefore we shall now pass from the duties of the sovereign to those which are owing to him from his people, and which are comprehended in the single word *allegiance*. [*Allegiance* is the tie or *ligamen*, which binds the subject to the sovereign, in return for that protection which the sovereign affords the subject. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or from whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be

(*h*) 1 Bl. Com. 236; 5 Ann. c. 8, art. xxv. s. 8. It may be noticed here, — in reference to the recent disestablishment of the Irish church, and the dissolution of its union with

that of England, — that the Act of Union *with Ireland* (39 & 40 Geo. 3, c. 67) does not refer to the terms of the coronation oath.

(*i*) Calvin's case, 7 Rep. 5 a.

[faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called *fidelitas*, or fealty: and an oath of fealty was required, by the feudal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our antient oath of allegiance (*j*); except that in the usual oath of fealty there was frequently a saving or exception of the faith due to some superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord in opposition to all men, without any saving or exception—" *contra omnes homines, fidelitatem fecit*" (*k*). Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liegemen; and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other, for lands held under their respective sovereignties, a distinction was always made between *simple* homage,—which was only an acknowledgment of the tenure;—and *liege* homage, which included the fealty before mentioned, and the services consequent upon it (*l*). Thus when our Edward the third, in 1329, did homage to Philip the sixth of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage (*m*). But with us, in England—it becoming a settled principle of tenure that *all* lands in the kingdom are holden of the king as the sovereign and lord paramount,—no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy, the term

(*j*) 2 Feud. 5, 6, 7; et vide sup.
vol. I. p. 177.

(*k*) 2 Feud. 99.

(*l*) Calvin's case, 7 Rep. 7.

(*m*) 2 Cart. 401; Mod. Un. Hist.
xxii. 420.

[of allegiance was soon brought to signify all other engagements due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years, contained a promise “to be true and “faithful to the king and his heirs, and truth and faith “to bear of life and limb and terrene honour; and not “to know or hear of any ill or damage intended him, “without defending him therefrom” (*n*). Upon which Sir Matthew Hale makes this remark, that it was short and plain, and not entangled with long or intricate clauses or declarations, and yet was comprehensive of the whole duty from the subject to his sovereign (*o*). But at the Revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, another form was introduced by the convention parliament which is more general and indeterminate than the former (*p*); the subject only promising “that he will be faithful and bear *true* allegiance” to the sovereign, without mentioning “his heirs,” or specifying in the least wherein that allegiance consists.] And in the oath of allegiance as administered up to the 23rd July, 1858, the style so introduced was still retained: and in connection therewith there were also used up to the same date oaths of supremacy and abjuration, as prescribed after the Revolution, by Acts in the reign of King William the third (*q*); though their forms had been resettled by statutes of later reigns (*r*). From the day above mentioned, however, a single oath was substituted by the 21 & 22 Vict. c. 48, to be taken in the same cases as the several oaths of allegiance, supremacy, and abjuration previously in force; and by 30 &

(*n*) *Mirroure*, c. 3, s. 35; *Fleta*, 3, 16; *Britton*, c. 29; *Calvin's case*, 7 Rep. 6 b.

(*o*) 1 Hal. P. C. 63. Sir M. Hale also informs us that the oath of allegiance might be tendered to all persons above the age of twelve

years, and that either in the court leet of the manor or in the sheriff's tourn. (*Ibid.* 64.)

(*p*) See 1 W. & M. sess. 1, c. 8.

(*q*) *Ibid.*; and 13 Will. 3, c. 6.

(*r*) See 1 Geo. 1, st. 2, c. 13; 6 Geo. 3, c. 53.

31 Vict. c. 75, such substituted oath was reframed so as to adapt it to the use not only of Protestants, but also of Roman Catholics and Jews. The form of oath, however, was again altered by the "Promissory Oaths Act, 1868" (*s*); and, as so settled, is to be used (with a few exceptions) whenever an oath of allegiance is required to be taken by a subject—that is to say, as the general rule, on the acceptance of any of the chief offices of state, or of a judicial appointment in one of the superior courts of law and equity, or of the office of justice of the peace (*t*).

But besides this express engagement, the law also holds that there is an implied, original, and virtual allegiance owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the duties of sovereignty before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance. [The formal profession, therefore, or oath, of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions Sir Edward Coke very justly to observe, that "all subjects are equally bounden to their allegiance as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same" (*u*). The sanction

(*s*) 31 & 32 Vict. c. 72, The Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), does not affect the form of the oath thus settled.

(*t*) The oath of allegiance as framed by the 31 & 32 Vict. c. 72, s. 2, is in the following simple terms:—"I, A. B., do swear that

"I will be faithful and bear true
"allegiance to her Majesty Queen
"Victoria, her heirs and successors,
"according to law. So help me
"God." (See also 33 & 34 Vict.
c. 14, s. 9).

(*u*) 2 Inst. 121.

[of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*. We may remark, too, that the doctrine of allegiance is held to be applicable, not only to the political capacity of the sovereign or regal office, but to his natural person and blood royal; and for the misapplication of their allegiance, viz., to the regal capacity or crown, exclusive of the person of the king, were the Spensers banished in the reign of Edward the second (*x*). And from hence arose that principle of personal attachment and affectionate loyalty which induced our forefathers (and, if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune and family, in defence and support of their liege lord and sovereign.

Allegiance, both express and implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local. Natural allegiance is such as is due from natural-born subjects (*y*). This is a tie which (subject to a qualification of recent introduction and presently to be explained) cannot be severed or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of our law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act

(*x*) 1 Hale, P. C. 67.

the description of natural-born sub-

(*y*) Calvin's case, 7 Rep. 6 b. jects, vide post, pp. 406, 407.

As to the persons who fall within

[of that prince, to whom it was first due (*z*). Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another (*a*); but it is his own act that brings him into these straits and difficulties, of owing service to two masters: and it is unreasonable, that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince (*b*).] In certain cases he may forfeit his rights as a British subject, by adhering to a foreign power, but he remains always liable to his duties: and if in the course of such employment he violates the laws of his native country, he will be exposed to punishment when he comes within reach of her tribunals.

[Local allegiance, on the other hand, is such as is due from an alien, or stranger-born, for so long time as he continues within the king's dominion and protection (*c*); and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is

(*z*) See 1 Hale, P. C. 68.

(*a*) See *Marryat v. Wilson*, 1 Bos. & Pul. 443.

(*b*) Sir Michael Foster observes, that "the well-known maxim, which the writers upon our law have adopted and applied to this case, "*nemo potest exuere patriam*, comprehendeth the whole doctrine of "natural allegiance."—Fost. 184. And this is exemplified by a strong instance, in the report which that learned judge has given of *Æneas Macdonald's* case (A.D. 1746). He was a native of Great Britain, but had received his education from his early infancy in France, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king. Acting

under that commission he was taken in arms against the king of England, for which he was indicted and convicted of high treason; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. (Christian's *Blackstone*, vol. i. p. 370.)

(*c*) Calvin's case, 7 Rep. 6 a. Sir M. Foster informs us, that it was laid down in a meeting of all the judges, that "if an alien, seeking the protection of the crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the king's enemies, for purposes of hostility, he may be dealt with as a traitor."—Fost. 185.

[therefore perpetual ; and local, temporary only ; and that for this reason, evidently founded upon the nature of government,—that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations Sir Matthew Hale deduces this consequence, that though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise any thing against his crown and dignity (*d*). And accordingly we find in fact, that even after the true prince has regained the sovereignty, such attempts against the usurper (unless in defence or aid of the rightful king,) have been afterwards punished with death,—because of the breach of that temporary allegiance, which was due to him as king *de facto*. As an example of which, we may remark, that after Edward the fourth recovered the crown, which had been long detained from his house by the line of Lancaster, treasons committed against Henry the sixth were capitally punished, though Henry had been declared an usurper by parliament.]

The doctrine, however, of the perpetual character of natural allegiance as above set forth, must under the existing law be taken with some qualification. For by the Naturalization Acts of 1870 and 1872 (*e*), it has been

(*d*) 1 Hale, P. C. 60.

(*e*) 33 & 34 Vict. c. 14; 35 & 36 Vict. c. 39.

now provided that any British subject who, when in any foreign state and not under any disability, shall have voluntarily *become naturalized* in such state, shall thenceforth be deemed to have ceased to be a British subject and be regarded as an alien; though provision is at the same time made to enable such person, on the same conditions as other aliens, to obtain from the secretary of state a certificate of re-admission to British nationality which will re-admit him to the status of a British subject (*f*). The Act also provides that any person who, by reason of having been born within the dominions of her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state—or who is born out of her Majesty's dominions of a father being a British subject—may make a declaration of alienage, and shall thenceforth cease to be a British subject (*g*).

The distinction between a natural-born subject and an alien is not, however, confined to the doctrine of allegiance,—there being between them this additional and important difference, that while every one of the former class is entitled to the full benefit and protection of the laws, the latter is still subject to some civil disabilities. But the capacity of an alien may be enlarged by his becoming a *denizen*, or being *naturalized*. There arise, therefore, in this manner, four distinguishable conditions, viz., those of: 1. Natural-born subjects; 2. Aliens; 3. Denizens; 4. Persons naturalized: and some notice shall here be taken of each of these in their order.

1. As to *natural-born subjects*. And, first, all persons born within the united kingdom, or in the colonies, fall within this description (*h*). And this extends even

(*f*) 33 & 34 Vict. c. 14, ss. 6, 8. Any British subject who, *before the passing of the Act*, had become naturalized in a foreign state, might nevertheless preserve his British nationality by making a declara-

tion of his desire so to do within two years after the 12th May, 1870. (Sect. 6.)

(*g*) Sect. 4.

(*h*) Calvin's case, 7 Rep. 18 a; Vaughan, 286. As to petitioning

to those born of aliens residing in this country, provided their parents were not at the time in enmity with our sovereign. But if a man be born within the realm, of parents who are alien enemies (as may be the case with the children of prisoners of war here confined), or be born of whatever parents in a country not parcel of the British dominions, even though belonging to the sovereign—he is an alien by the common law, though on this rule certain important exceptions have been now grafted by statute, which will be presently noticed. Hence it became necessary, after the Restoration, to pass a particular act of parliament, “for the naturalization of children of His Majesty’s English subjects born in foreign countries during “the late troubles” (*i*). This doctrine is founded on a general principle, that every man owes natural allegiance where he is born; and cannot owe two such allegiances, or serve two masters, at once. However the children of the sovereign and the heirs of the crown, wherever born, have always been held natural-born subjects. And the case has always been the same with regard to the children of our ambassadors, born abroad (*k*); for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent, therefore the son is held (by a kind of *postliminium*) to be born under the queen’s allegiance, represented by his father the ambassador. And there seems to have been formerly no other exception than these to the rule, that persons born out of the dominions of the crown are aliens. But other very material ones have since been introduced. [For to encourage foreign commerce it was enacted by statute 25 Edward III. st. 2, that all children born abroad, provided *both* their parents were, at the time of their birth, in allegiance to the king, and the mother had passed the seas by her husband’s consent, might inherit as if born in

the Court of Divorce, for a decree declaratory of the right to be deemed a natural-born subject, vide sup. p. 239.

(*i*) 1 Bl. Com. 373; Stat. 29 Car. 2, c. 6.

(*k*) Calvin’s case, 7 Rep. 18 a.

[England (*l*); and accordingly it hath been so adjudged on behalf of merchants (*m*). And by several modern statutes the restriction of the common law is still further relaxed (*n*); so that now persons born abroad whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are deemed to be natural-born subjects themselves, to all intents and purposes.]

2. As to *aliens*. The legal notion of an alien has been already sufficiently defined (*o*). As to his rights when brought into any relation to this country, they are now largely assimilated to those of natural-born subjects; but there are certain distinctions to some of which it will be proper to advert shortly, though their importance, by the effect of recent legislation, has become greatly diminished.

In the first place, then, an alien, until the changes just referred to, could not in general inherit lands within this realm; nor (except as regards such of his descendants as were natural-born subjects) had he any inheritable blood, so as to transmit an estate in land, by descent (*p*). Again, though an alien might purchase lands, yet by the general rule it was not for his own use, for the king was thereupon entitled to them (*q*); for (it was said) if an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England, which would probably be inconsistent with that which he owed to his own natural liege lord: besides that thereby this nation might in time be subject to foreign influence, and feel many other inconveniences. On the other hand, an alien, the subject of a friendly state and being a merchant, has always been allowed to acquire,

(*l*) *Doe v. Jones*, 4 T. R. 300.

(*m*) *Bacon v. Bacon*, Cro. Car. 601; Mar. 91; Jenk. Cent. 3.

(*n*) 7 Ann. c. 5; 4 Geo. 2, c. 21; 13 Geo. 3, c. 21.

(*o*) Vide sup. p. 404; and vol. I. pp. 134, 440, 477. At one period of our history *Jews* born in

this kingdom seem to have been regarded almost as aliens. Some account of their present legal condition will be found, post, bk. IV. pt. II. c. II.

(*p*) Vide sup. vol. I. pp. 440, 441.

(*q*) 1 Bl. Com. 372; Vide sup. vol. I. p. 477.

in this realm, a property in goods, money, and other personal estate, or to hire a house for his habitation: though he must comply with the regulations contained in 6 & 7 Will. IV. c. 11, in respect of the registration of aliens, a statute passed with the object of holding them under proper control (*r*). Also an alien might always bring an action in this country concerning personal property, and make a will, and dispose of his personal estate (*s*). Though as to all the rights above mentioned, they must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights or privileges (unless by the king's special favour) during the time of war (*t*).

But, as before observed, aliens are now placed in a position far more favourable than they held under the modified privileges previously accorded to them. For the Naturalization Act, 1870, contains a general provision that real and personal property of every description may be now taken, acquired, held and disposed of by an alien—and that a title to such property may be derived through, from or in succession to an alien—in the same manner in all respects as by, through, from or in succession to a natural-born British subject (*u*). But there is a proviso that

(*r*) When political circumstances, however, have rendered it expedient to adopt greater caution as to aliens, the course has been to pass a temporary Act, empowering a secretary of state, during a period specified, to order any particular alien to quit the realm where information has been received, showing the expediency of his removal. The 11 & 12 Vict. c. 20, is an instance of such an Act.

(*s*) 2 Rol. Rep. 94. Blackstone (vol. i. p. 372) observes that the old French law in this matter was very different, the king on the death

of an alien being held entitled to all he was worth, by the *droit d'aubaine* or *jus albinatus*.

(*t*) Bl. Com. ubi sup. As the general rule, the right of action upon a contract entered into with an alien during peace, is *suspended* on war being declared against the country of which he is a native. (See *Alcenons v. Nigreu*, 4 Ell. & Bl. 217.)

(*u*) 33 & 34 Vict. c. 14, s. 2. It has, however, been decided that this provision does not give an alien a good title to real estate purchased prior to its date (*Sharp v. St. Sauveur*, Law Rep., 7 Ch. App. 343).

this enactment shall not qualify an alien for any office or for any municipal, parliamentary or other franchise, or entitle him to any right or privilege as a British subject, except as thereby expressly given to him (*x*); and it is further provided by the Act that nothing therein shall qualify an alien to be the owner of a British ship (*y*).

3. As to *denizens*. [A denizen is one alien born, but who has obtained *ex donatione regis* letters-patent to make him, to a certain extent, an English subject; a high and incommunicable branch of the royal prerogative (*z*). A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. But no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands and the like from the crown (*a*).] And it forms one of the enactments of the Naturalization Act, 1870, that nothing therein contained shall affect the grant of any letters of denization by her Majesty (*b*).

4. There is also to be considered the case of *aliens naturalized*. Naturalization can be effected either by act of parliament, or by the certificate of a secretary of state. By naturalization according to the first method, an alien is usually put in exactly the same state as if he had been born in the king's ligeance. It has therefore a retrospective effect, in which (among other articles) it differs from mere denization. And consequently if a man be naturalized by act of parliament, his son, born before, may inherit land in this realm (*c*). As for the second species of naturalization, viz., that by certificate of the secretary of state, it is a modern method introduced in the year 1844 by 7 & 8 Vict. c. 66, in order to enable foreigners

(*x*) 33 & 34 Vict. c. 14, s. 2.

(*a*) Stat. 12 Will. 3, c. 2.

(*y*) Sect. 14.

(*b*) 33 & 34 Vict. c. 14, s. 13.

(*z*) Calvin's case, 7 Rep. 25; see

(*c*) Co. Litt. 129 a; vide sup.

Com. Dig. Aliens, D. 1; Wilson v. vol. I. p. 441.

Marryatt, 8 T. R. 31.

coming to reside and settle in the united kingdom to obtain the advantages of naturalization in a less expensive and tedious way than by procuring a private Act (*d*). This statute, indeed, has been repealed (*e*); but by the Acts on this subject now existing, viz., the Naturalization Acts, 1870, 1872, an alien who has resided in the united kingdom (or has been in the service of the crown) for not less than five years, and intends when naturalized either to reside in the united kingdom or to serve under the crown, is enabled to apply for a certificate of naturalization to one of the secretaries of state; who may, after receiving the necessary evidence in support of the same, issue, if he shall so think fit, to the applicant, a certificate accordingly; whereupon, on his first taking the oath of allegiance (*f*), the alien shall in the united kingdom be entitled to all political and other rights, powers and privileges, and be subject to all the obligations to which a natural-born British subject is entitled or subject in the united kingdom (*g*).

[These are the principal distinctions between aliens, denizens, and natives: distinctions which it was once endeavoured to lay almost totally aside, by passing one general naturalization Act for all foreign Protestants—an attempt which was carried into execution by the statute 7 Ann. c. 5. But this, after three years' experience of it, was repealed by the statute 10 Ann. c. 5, with the exception of one clause for naturalizing the children of English parents born abroad. However by other statutes (*h*), all foreign Protestants and Jews, upon their residing seven years in any of the American colonies without being absent above two months at a time,—and all foreign Protestants serving two years in a military capacity there, or being

(*d*) A private naturalization Act is even yet, however, occasionally obtained.

(*e*) By 33 & 34 Vict. c. 14.

(*f*) See the Naturalization Oaths

Act, 1870 (33 & 34 Vict. c. 102).

(*g*) 33 & 34 Vict. c. 14, s. 7.

(*h*) See stat. 13 Geo. 2, c. 7; 20 Geo. 2, c. 44; 13 Geo. 3, c. 25.

[three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within certain incapacities,—shall, upon taking the oaths of allegiance and abjuration, be naturalized to all intents and purposes, as if they had been born in this kingdom ;—except indeed as to sitting in parliament, or in the privy council, and holding offices or grants from the crown (*i*).]

(*i*) By 13 Geo. 2, c. 3, the same effect was made to follow service for two years on board an English ship in time of war ; but this statute was repealed by 30 & 31 Vict. c. 59.

In the year 1753 was passed the famous Jew Bill, 26 Geo. 2, c. 26, to enable all foreigners who were

Jews to be naturalized without taking the sacrament, but the popular dislike of it was so great, that it was repealed in the next session, by 27 Geo. 2, c. 1. Now, however, by 6 Geo. 4, c. 67, the necessity for taking the sacrament on being naturalized is taken away altogether.

CHAPTER III.

OF THE ROYAL TITLE.



[THE executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage,—it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent: in order to mark out with precision, who is that single person, to whom (in subservience to the law of the land), is committed the care and the protection of the community,—and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences of private men, that this rule should be clear and indisputable; and our constitution has not left us in the dark upon this material occasion. It will therefore be the endeavour of this chapter to trace out the constitutional doctrine of the royal succession, with that freedom and regard to truth, yet mixed with that reverence and respect, which the principles of liberty and the dignity of the subject require.]

The grand fundamental maxim upon which the *jus coronæ*, or right of succession to the throne of these kingdoms, depends, seems to be that the crown is, by common law and constitutional custom, hereditary; but in a manner peculiar to itself: and that the right of the reigning prince may from time to time be set aside by

act of parliament, in favour of a new sovereign ; in whom the crown will still continue hereditary as before, except so far as the succession may have been otherwise limited by the same parliamentary authority (*a*). And this proposition it will be the business of this chapter to prove, in all its branches ; first, that the crown is hereditary ; secondly, that it is hereditary in a manner peculiar to itself ; thirdly, that the right of the reigning prince to it may be set aside, in favour of another, by parliament ; lastly, that, except as otherwise limited by parliament, it is hereditary, as before, in the new proprietor.

1. [First, it is in general hereditary, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective ; and as no instance is known wherein the crown of England has ever been asserted to be elective, except when it was maintained to be so by the regicides at the infamous trial of King Charles the first, it must of consequence be hereditary. Yet, by the assertion of an hereditary, a *jure divino* title to the throne is of course by no means intended. Such a title may be allowed to have subsisted under the theocratic establishments of the children of Israel in Palestine : but it never yet subsisted in any other country, save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of Providence. Nor indeed have a *jure divino* and an hereditary right any necessary connection with each other, as some have very weakly imagined. The titles of David and Jehu were equally *jure divino*, as those of either Solomon or Ahab ; and yet

(*a*) The maxim, as stated by Blackstone (vol. i. p. 191), is as follows :—" That the crown is, by " common law and constitutional " custom, hereditary ; and this in a " manner peculiar to itself ; but that " the right of inheritance may from " time to time be changed or limited

" by act of parliament ; under which " limitations the crown still continues hereditary." It is conceived that his meaning is the same as that expressed in the text, but that his words do not convey that meaning with the degree of precision that is desirable.

[David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the throne of their fathers, or to destroy the house of the preceding sovereign, they will then, and not before, possess the crown of England, by a right like theirs, immediately derived from heaven. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one society having no connection with, or influence upon, the fundamental polity of another. The founders of our English monarchy might, perhaps, if they had thought proper, have made it an elective monarchy; but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law: the very same title that every private man has to his own estate.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any, to the rational principles of government, and the freedom of human nature: and accordingly we find from history, that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose a state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, it might be plausibly argued that elective succession were as much to be desired in a kingdom, as in other inferior communities; for that the best, the wisest, and the bravest man, would then be sure of receiving that crown, which his endowments have merited; and the sense of an unbiassed majority would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that elections

[of every kind (in the present state of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a spleenetic disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage, that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas, in the great and independent society, which every nation composes, there is no superior to resort to but the law of nature; no method to redress the infringements of that law, but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles; the only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established in this and many other countries, in order to prevent that periodical bloodshed and misery, which the history of antient imperial Rome, and the more modern experience of Poland and Germany, may show us to be the consequences of elective kingdoms.

2. But, secondly, as to the particular mode of inheritance—it in general corresponds with the feudal path of descents, chalked out by the common law in the succession to landed estates. Like estates, the crown will descend

[lineally to the issue of the reigning monarch; as it did from King John to Richard the second, through a regular pedigree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward the fifth succeeded to the crown, in preference to Richard, his younger brother, and Elizabeth, his eldest sister. Like lands or tenements, the crown, on failure of the male line, descends to the issue female; according to the antient British custom remarked by Tacitus; “*neque enim sexum in imperiis discernunt*” (*b*). Thus the first Mary succeeded to Edward the sixth; and the line of Margaret Queen of Scots, the daughter of Henry the seventh, succeeded on failure of the line of Henry the eighth, his son. But, among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne, having occasioned the royal law of descents to depart from the common law in this respect; and therefore Queen Mary on the death of her brother succeeded to the crown alone, and not in parcenary with her sister Elizabeth. Again; the doctrine of representation prevails in the descent of the crown, as it does in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus Richard the second succeeded his grandfather Edward the third, in right of his father the Black Prince, to the exclusion of all his uncles, his grandfather’s younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late sovereign; provided they are lineally descended from the blood royal, that is, from that royal stock which originally acquired the crown.

(*b*) In Vit. Agricolaë. See Coleridge’s Blackst. vol. i. p. 194, n. (1).

[Thus Henry the first succeeded to William the second, John to Richard the first, and James the first to Elizabeth, being all derived from the Conqueror, who was then the only regal stock. And herein there never was any objection to the succession of a brother, an uncle, or other collateral relation, of the half blood (*c*) ; that is, where the relationship proceeds not from the same couple of ancestors (which constitutes a kinsman of the whole blood), but from a single ancestor only ;—as when two persons are derived from the same father, and not from the same mother, or *vice versâ* ;—provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood royal is communicated to each. Thus Mary the first inherited to Edward the sixth, and Elizabeth inherited to Mary ; all children of the same father, King Henry the eighth, but all by different mothers.

3. The doctrine of hereditary right does by no means imply an indefeasible right to the throne. No man will, we think, assert this, who has considered our laws, constitution, and history, without prejudice and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom,—the sovereign and both houses of parliament,—to defeat this hereditary right ; and, by particular entails, limitations and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution ; as may be gathered from the expression so frequently used in our statute book of “ the king’s majesty, his heirs, and successors.” In which we may observe, that as the word “ heirs ” necessarily implies an inheritance or hereditary right, generally subsisting in the royal person ; so the word “ successors,” distinctly taken, must imply that this inheritance must sometimes be broken through ; or, that there may be a successor with-

(*c*) It will be remembered that until the Inheritance Act of 1833, the half-blood did not succeed in the case of an ordinary descent. Vide sup. vol. I. p. 420.

[out being the heir of the king. And this is so extremely reasonable, that, without such a power lodged somewhere, our polity would be very defective. For let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning; how miserable would the condition of the nation be, if he were also incapable of being set aside!—It is therefore necessary that this power should be lodged somewhere; and yet the inheritance and regal dignity would be very precarious indeed, if this power were lodged in the hands of the subject only, to be exerted whenever prejudice, caprice or discontent, should happen to take the lead. Consequently it can nowhere be properly lodged but in the two houses of parliament, by and with the consent of the reigning sovereign; who, it is not to be supposed, will agree to any thing improperly prejudicial to the rights of his own descendants. And therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. But, fourthly; however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer in the same manner as it was before hereditary in his predecessor, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir at law: but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel so limited and prescribed, and no other.

In these four points consists, it may be said, the constitutional notion of hereditary right to the throne: which will be still further elucidated, and made clear beyond all

[dispute, from a short historical view of the succession to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar, the hereditary title to the throne. And in the pursuit of this inquiry we shall find, that, from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above mentioned have ever been held the constitutional canons of succession. It is true, the succession, through fraud or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it; of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance; and transmitted or endeavoured to transmit it to their own posterity, by a kind of hereditary right of usurpation.

King Egbert, about the year 800, found himself in possession of the throne of the West Saxons, by a long and undisturbed descent from his ancestors of above three hundred years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity, as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better (*d*). The other

(*d*) According to Turner, Egbert succeeded as the only surviving descendant of Cerdic, who at the head of a colony of Saxons had invaded

[kingdoms of the heptarchy he acquired, some by conquest, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and states, and the other loses them; the latter entirely assimilates with or is melted down in the former, and must adopt its laws and customs(*e*). And in pursuance of this maxim there hath ever been, since the union of the heptarchy in King Egbert, a general acquiescence under the hereditary monarchy of the West Saxons, through all the united kingdoms(*f*).

From Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly, through a succession of fifteen princes of the same royal family, though the course of descent in other respects was subject to some irregularities(*g*); the most material of which were, that the king last mentioned, and one of his predecessors, Athelstan, were illegitimate, and

the western parts of the island, A.D. 495, and founded what was afterwards called Wessex, or the West Saxon Kingdom. (Turner's Hist. Anglo-Sax., vol. i. pp. 269, 270, 271, 420, 6th edit.)

(*e*) Puff. L. of N. and N. b. 8, c. 12, § 6.

(*f*) According to Turner, Egbert did not acquire the other Anglo-Saxon kingdoms, except in the sense of establishing the general predominance of Wessex. "The claims of "Egbert" (he also says) "to this "honour" (of being the founder of the English monarchy) "are unquestionably surreptitious. The "competition can only be between "Alfred and Athelstan . . . The "truth seems to be that Alfred was "the first monarch of the Anglo-Saxons, but Athelstan the first

"monarch of England;" and in support of this he remarks that, in the time of Alfred, the Danish sovereigns divided the island with him, and that "it was not until Athelstan "completely subjugated the Anglo-Danish power, that the monarchy "of England arose." (Turner, *ubi* sup. vol. i. p. 429; vol. ii. p. 190; vol. iii. p. 173, 6th edit.)

(*g*) In reference to these irregularities, Mr. Hallam says, "The "Saxons, like most European nations, while they limited the inheritance of the crown exclusively "to one royal family, were not very "scrupulous about the devolution "upon the nearest heir." (Hallam's Mid. Ages, vol. ii. p. 380, 7th edit. See also Turner, *ubi* sup., vol. iii. p. 150.)

[that each took the crown in the lifetime of a legitimate brother (*h*).

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, King of Denmark; and Canute, after his death, seized the whole of it, Edmund's sons being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne; in whom however this new acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the antient Saxon line was restored in the person of Edward the Confessor, the surviving son of Etheldred, the father and predecessor of Edmund Ironside (*i*).

On the decease of Edward without issue, Harold the second usurped the throne; and almost at the same instant came on the Norman invasion; the right to the crown being all the time in Edgar, surnamed Atheling (which signifies in the Saxon language *illustrious*, or of royal blood), who was the son of Edward the Outlaw, and grandson of Edmund Ironside; or as Matthew Paris well expresses the sense of our old constitution, "*Edmundus autem Latusferreum, rex naturalis de stirpe regum, genuit Edwardum; et Edwardus genuit Edgarum, cui de jure debebatur regnum Anglorum*" (*k*).

William the Norman claimed the crown by virtue of a pretended grant from King Edward the Confessor, a

(*h*) See Turner's Hist. Anglo-Sax. vol. ii. pp. 176, 223, 326, 355; Palgrave's Hist. of the Anglo-Saxons, cap. X.; Pearson's Hist. of the Early and Middle Ages of England, pp. 124, 151. Blackstone (vol. i. p. 198) notices also the following exceptions, that the sons of Ethelwolf succeeded each other without regard to the children of the elder branches, according to the rule of succession

prescribed by their father, and confirmed by the wittena-gemote, in the heat of the Danish invasions; and that Edred, the uncle of Edwy, reigned for about nine years, in troublesome times, in right of his nephew, a minor.

(*i*) Turner, ubi sup. vol. ii. p. 355.

(*k*) A. D. 1066.

[grant which, if real, was in itself utterly invalid; because it was made, as Harold well observed in his reply to William's demand, "*absque generali senatûs et populi conventu et edicto*" (*l*); which also very plainly implies, that it was then generally understood that the king, with consent of the general council, might dispose of the crown and change the line of succession. William's title, however, was altogether as good as Harold's, he being a mere private subject, and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times, though frequently asserted by the English nobility after the Conquest, till such time as he died without issue; but all their attempts proved unsuccessful, and only served the more firmly to establish the crown in the family which had newly acquired it.

* This conquest, then, by William of Normandy was, like that of Canute before, a forcible transfer of the crown of England into a new family; but the crown being so transferred, all the inherent properties of the crown were with it transferred also. For, the victory obtained at Hastings not being a victory over the nation collectively (*m*), but only over the person of Harold, the only right that the conqueror could pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore, as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility. Here then we must drop our race of Saxon kings, at least for a while, and derive our descents from William the Conqueror, as from a new stock; who acquired by right of war, (such as it is, yet still the *dernier ressort* of kings,) a strong and undisputed title to the inheritable crown of England.

Accordingly it descended from him to his sons William

(*l*) William of Mahmsb. 1. 3.

(*m*) Hale, Hist. C. L. c. 5; Seld. Review of Tithes, c. 8.

[the second and Henry the first. It must be owned that his eldest son, Robert, was kept out of possession by the arts and violence of his brethren; who perhaps might proceed upon a notion, which prevailed for some time in the law of descents,—though never adopted as the rule of public successions (*n*),—that when the eldest son was already provided for, (as Robert was constituted Duke of Normandy by his father's will,) in such a case the next brother was entitled to enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have had at first.

Stephen of Blois, who succeeded him, was indeed the grandson of the Conqueror, by Adelia, his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald, who was Earl of Blois: and therefore seems to have waived, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the Empress Matilda or Maud, the daughter of Henry the first: the rule of succession being, (where women are admitted at all,) that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and therefore he rather chose to rely on a title by election (*o*), while the Empress Maud did not fail to assert her hereditary right by the sword; which dispute was attended with various success, and ended at last in the compromise made at Wallingford, that Stephen should keep the crown, but that Henry, the son of Maud, should succeed him, as he afterwards accordingly did.

Henry, the second of that name, was (next after his

(*n*) See Lord Lyttelton's Life of Henry the second, vol. i. p. 467. *Anglorum electus, &c.*—(Cart. A.D. 1136; Ric. de Hagustald. 314;

(*o*) "*Ego Stephanus, Dei gratiâ, assensu cleri et populi in regem* Hearne ad Guil. Neubr. 711.)

[mother Matilda) the undoubted heir of William the Conqueror: but he had also another connexion in blood, which endeared him still further to the English. He was lineally descended from Edmund Ironside, of the Saxon race of hereditary kings (*p*). For Edward the Outlaw, the son of Edmund Ironside, had (besides Edgar Atheling, who died without issue) a daughter, Margaret, who was married to Malcolm, king of Scotland, and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda, the wife of Henry the first; who by him had the Empress Mand, the mother of Henry the second. Upon which account, the Saxon line is in our histories frequently said to have been restored in his person; though, in reality, that right subsisted in the *sons* of Malcolm by Queen Margaret; King Henry's best title being as heir to the Conqueror.

From Henry the second the crown descended to his eldest son, Richard the first, who dying childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother; but John, the youngest son of King Henry, seized the throne, claiming the crown, as appears from his charters, by hereditary right (*q*); that is to say, he was next of kin to the deceased king, being his surviving brother; whereas Arthur was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents hath now been settled for so many centuries, they were sufficient to puzzle the understandings of our brave but unlettered ancestors. Nor, indeed, can we wonder at the number of partizans who espoused the

(*p*) Blackstone's expression is, "the *last* of the Saxon race of hereditary kings." But this description belongs to Edward the Confessor.

(*q*) "*—Regni Angliæ; quod nobis jure competit hereditario.*" —Spelm. Hist. R. Joh. apud Wilkins, 354.

[pretensions of King John in particular, since, even in the reign of his father King Henry the second, it was a point undetermined, whether, even in common inheritances, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood (*r*). And it long afterwards remained undecided, in the collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of degree, should take place (*s*). However, on the death of Arthur, and his sister Eleanor without issue, a clear and indisputable title vested in Henry the third, the son of John: and from him to Richard the second, a succession of six generations, the crown descended in the true hereditary line. Under one of which race of princes we find it declared in parliament, “that
 “ the law of the crown of England is, and always hath
 “ been, that the children of the King of England, whether
 “ born in England or elsewhere, ought to bear the inherit-
 “ ance after the death of their ancestors. Which law our
 “ sovereign lord the king, the prelates, earls, and barons,
 “ and other great men, together with all the commons
 “ in parliament assembled, do approve and affirm for
 “ ever” (*t*).

Upon Richard the second's resignation of the crown, he having no children, the right resulted to the issue of his grandfather Edward the third. That king had many children besides his eldest, Edward the black prince of Wales, the father of Richard the second; but to avoid confusion, we shall only mention three: William the second son, who died without issue; Lionel Duke of Clarence, his third son; and John of Gaunt Duke of Lancaster, his fourth. By the rules of succession, therefore, the posterity of Lionel Duke of Clarence were entitled to the throne upon the resignation of King Richard; and had accordingly been declared by the king, many years before, the

(*r*) Glanv. l. 7, c. 3.

(*t*) Stat. 25 Edw. 3, st. 2.

(*s*) Mod. Un. Hist. xxx. 512.

[presumptive heirs of the crown ; which declaration was also confirmed in parliament (*u*). But Henry Duke of Lancaster, the son of John of Gaunt, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety ; and he became king under the title of Henry the fourth. But, as Sir Matthew Hale remarks (*x*), though the people unjustly assisted Henry the fourth in his usurpation of the crown, yet he was not admitted thereto until he had declared that he claimed, not as a conqueror,—which he very much inclined to do (*y*),—but as a successor, descended by right line of the blood royal ; as appears from the rolls of parliament in those times. And in order to this, he set up a show of two titles : the one upon the pretence of being the first of the blood royal in the entire male line, whereas the Duke of Clarence left only one daughter Philippa ; from which female branch, by a marriage with Edmund Mortimer Earl of March, the house of York descended : the other, by reviving an exploded rumour, first propagated by John of Gaunt, that Edmund Earl of Lancaster (to whom Henry's mother was heiress), was in reality the elder brother of King Edward the first : though his parents, on account of his personal deformity, had imposed him on the world for the younger ; and therefore Henry would be entitled to the crown, either as successor to Richard the second, in case the entire male line was allowed a preference to the female ; or even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

However, as in Edward the third's time we find the parliament approving and affirming the law of the crown as before stated, so in the reign of Henry the fourth they actually exerted their right of new-settling the succession

(*u*) Sandford's Geneal. Hist. 246.

(*y*) Seld. Tit. Hon. I, 3.

(*x*) Hist. C. L. c. 5.

[to the crown. And this was done by the statute 7 Hen. IV. c. 2, whereby it is enacted, “that the inheritance of the crown and realms of England and France, and all other the king’s dominions, shall be set and remain in the person of our sovereign lord the king, and in the heirs of his body issuing;” and Prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to the Lord Thomas, Lord John, and Lord Humphry, the king’s sons, and the heirs of their bodies respectively; which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It however serves to show that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown; and we may also observe with what caution and delicacy the parliament then avoided declaring any sentiment of Henry’s original title. However Sir Edward Coke more than once expressly declares, that at the time of passing this Act the right of the crown was in the descent from Philippa, daughter and heir of Lionel Duke of Clarence (a).

Nevertheless the crown descended regularly from Henry the fourth, to his son and grandson Henry the fifth and Henry the sixth; in the latter of whose reigns the house of York asserted their dormant title; and, after imbruing the kingdom in blood and confusion for seven years together, at last established it in the person of Edward the fourth. At his accession to the throne, after a breach of the succession that continued for three descents, and above threescore years, the distinction of a king *de jure* and a king *de facto* began to be first taken—in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom, by confirming all honours conferred and all acts done, by those who were now called the usurpers, not tending to the disherison of

(a) 4 Inst. 37, 205.

[the rightful heir. In statute 1 Edw. IV. c. 1, the three Henrys are styled, “late kings of England successively in deed, and not of right.” And in all the known charters of King Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them “*nuper de facto, et non de jure, reges Angliæ.*”

Edward the fourth left two sons and a daughter; the eldest of which sons, King Edward the fifth, enjoyed the regal dignity for a very short time, and was then deposed by Richard, his unnatural uncle, who immediately usurped the royal dignity, having previously insinuated to the populace a suspicion of bastardy in the children of Edward the fourth, to make a show of some hereditary title. After which he is generally believed to have murdered his two nephews, upon whose death the right of the crown devolved to their sister Elizabeth.

The tyrannical reign of King Richard the third gave occasion to Henry Earl of Richmond to assert his title to the crown. A title the most remote and unaccountable that was ever set up, and which nothing could have given success to, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gaunt, whose title was now exploded, the claim (such as it was) was through John Earl of Somerset, a bastard begotten by John of Gaunt upon Katherine Swinford, and the lineal ancestor of Richmond through his mother Margaret. It is true that, by an act of parliament of the twentieth year of Richard the second, this son was with others legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock; but still with an express reservation of the crown, “*exceptâ dignitate regali*” (*b*).

Notwithstanding all this, immediately after the battle of Bosworth Field, he assumed the regal dignity; the right of the crown then being, as Sir Edward Coke expressly declares, in Elizabeth, eldest daughter of Edward the

[fourth (*c*); and his possession was established by parliament, holden the first year of his reign. In the Act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry the fourth; and therefore (as Lord Bacon, the historian of this reign, observes) carefully avoided any recognition of Henry the seventh's right, which indeed was none at all: and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way (as the noble historian expresses it) of establishment, and that under covert and indifferent words, "that the inheritance of the crown should rest, remain, and abide in King Henry the seventh and the heirs of his body;" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the Conqueror, and thereby gained—as Sir Edward Coke declares—by much his best title to the crown (*d*). Whereupon the Act made in his favour was so much disregarded, that it never was printed in our statute books.

Henry the eighth, the issue of this marriage, succeeded to the crown by clear indisputable hereditary right,—his eldest brother, Prince Arthur, having died without issue,—and transmitted it to his three children in successive order. But in his reign we find the parliament, at several times, busy in regulating the succession to the kingdom. And first, by statute 25 Henry VIII. c. 22, which recites the mischiefs which had and might ensue by disputed titles, because no perfect and substantial provision had been made by law concerning the succession; and then enacts, that the crown shall be entailed to his majesty, and the sons or heirs male of his body; and in default of

(*c*) 4 Inst. 37.(*d*) Ibid.

[such sons to the Lady Elizabeth—who is declared to be the king's eldest issue female, in exclusion of the Lady Mary, on account of her supposed illegitimacy by the divorce of her mother Queen Catherine—and to the heirs of the body of the Lady Elizabeth; “and so from issue female to issue female, and the heirs of their bodies, by course of inheritance according to their ages, as the crown of England hath been accustomed and ought to go, in case where there be heirs female to the same: and for default of such issue, then to the king's right heirs for ever.” This single statute is an ample proof of all the four positions we at first set out with.

But, upon the king's divorce from Anne Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Hen. VIII. c. 7: wherein the Lady Elizabeth was also, as well as the Lady Mary, bastardized, and the crown settled on the king's children by Queen Jane Seymour, and his future wives; and, in default of such children, then with this remarkable remainder, “to such persons as the king by letters-patent, or last will and testament, shall limit and appoint the same:” a vast power; but notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution: for by statute 35 Hen. VIII. c. 1, the king's two daughters were legitimated again; and the crown was limited to Prince Edward by name, after that to the Lady Mary, and then to the Lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law with regard to the descent of the crown.

But lest there should remain any doubt in the minds of the people, through this jumble of Acts for limiting the succession,—Queen Mary's hereditary right to the throne was acknowledged by statute 1 Mar. sess. 2, c. 1, and recognized in these words: “The crown of these realms “is most lawfully, justly, and rightly descended and come

[“ to the queen’s highness that now is, being the very, true, “ and undoubted heir and inheritrix thereof.” And again, upon the Queen’s marriage with Philip of Spain, by the statute which settles the preliminaries of that match, the hereditary right to the crown was thus asserted and declared: “ As touching the right of the Queen’s inheritance in the realm and dominions of England, the “ children, whether male or female, shall succeed in them, “ according to the known laws, statutes, and customs of “ the same” (*e*). Which determination of the parliament, that the succession shall continue in the usual course, seems tacitly to imply a power of new-modelling and altering it, in case the legislature had thought proper.

On Queen Elizabeth’s accession, her right was recognized in still stronger terms than her sister’s; the parliament acknowledging, “ that the queen’s highness is, and “ in very deed and of most mere right ought to be, by the “ laws of God, and the laws and statutes of this realm, our “ most lawful and rightful sovereign liege lady and queen; “ and that her highness is rightly, lineally, and lawfully “ descended and come of the blood royal of this realm of “ England; in and to whose princely person, and the heirs “ of her body lawfully to be begotten, after her, the imperial crown and dignity of this kingdom are vested, “ limited, and annexed” (*f*).] And in the same reign, by statute 13 Eliz. c. 1, we find the right of parliament to direct the succession of the crown distinctly asserted,—it being provided that it shall be treason to affirm that the laws and statutes do not bind the right of the crown, and the descent, limitation, inheritance, or government thereof. And, further, that any person who shall, during the queen’s life, by any written or printed work, expressly affirm, print or publish, before the same is established by parliament, that any particular person is or ought to be heir and successor to the queen, except the same be the natural issue of her

(*e*) 1 Mar. sess. 3, c. 2.

(*f*) Stat. 1 Eliz. c. 3.

body,—shall, for the first offence, suffer imprisonment and the loss of half his goods, and for the second the penalty of a *præmunire* (g).

[On the death of Queen Elizabeth without issue, the line of Henry the eighth became extinct. It therefore became necessary to recur to the other issue of Henry the seventh, by Elizabeth of York his queen; whose eldest daughter, Margaret, having married James the fourth, king of Scotland, king James the sixth of Scotland, and of England the first, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry the eighth, centered all the claims of different competitors, from the Conquest downwards, he being indisputably the lineal heir of the Conqueror. And what is still more remarkable, in his person also centered the right of the Saxon monarchs, which had been suspended from the Conquest, till his accession. For Margaret, the sister of Edgar Atheling, the daughter of Edward the Outlaw, and grand-daughter of king Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the Conquest, resided. She married Malcolm king of Scotland: and Henry the second, by a descent from Matilda their daughter, is generally called the restorer of the Saxon line. But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters; and that the royal family of Scotland from that time downwards, were the offspring of Malcolm and Margaret. Of this royal family, King James the first was the direct lineal heir; and therefore united in his person every possible claim by hereditary right, to the English as well as Scottish throne.

And it is no wonder that a prince of more learning than wisdom, who could deduce an hereditary title for so many centuries, should easily be taught by the flatterers of the times to believe there was something divine in this right, and that the finger of Providence was visible in its preser-

(g) Vide bk. vi. chap. vi.

[vation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him, no natural, but a positive right. And in this and no other light was it taken by the English parliament; who, by statute 1 Jac. I. c. 1, did “recognize and acknowledge “that immediately upon the dissolution and decease of “Elizabeth, late queen of England, the imperial crown “thereof did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty, as being lineally, justly, and lawfully, next “and sole heir of the blood royal of this realm.” Not a word here of any right immediately derived from heaven: which, if it existed anywhere, must be sought for among the aborigines of the island, the antient Britons; among whose princes, indeed, some have gone to search it for him (*h*).

But, wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing that when so many human hereditary rights had centered in this king, his son and heir, King Charles the first, should be told by those infamous judges, who pronounced his unparalleled sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favour of hereditary monarchy to all future ages, as they proved at last, to the then deluded people: who, in order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the states restored the right heir of the crown. And in the proclamation for that purpose, which was

(*h*) Elizabeth of York, the mother of Queen Margaret of Scotland, was heiress of the house of Mortimer. And Mr. Carte observes, that the house of Mortimer, in virtue of its

descent from Gladys, only sister to Llewellyn ap Iorwerth the Great, had the true right to the principality of Wales. (Hist. Eng. iii. 705.)

[drawn up and attended by both houses, they declared, “ that according to their duty and allegiance they did “ heartily, joyfully, and unanimously acknowledge and “ proclaim, that, immediately upon the decease of our late “ sovereign lord King Charles, the imperial crown of these “ realms did by inherent birthright and lawful and undoubted succession descend and come to his most excellent majesty Charles the second, as being lineally, justly, “ and lawfully, next heir of the blood royal of this realm: “ and thereunto they most humbly and faithfully did “ submit and oblige themselves, their heirs, and posterity “ for ever ” (*i*).

Thus, it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath been ever an hereditary crown ; though subject to limitations by parliament. The remainder of this chapter will consist principally of those instances, wherein the parliament since the Restoration has asserted or exercised this right of altering and limiting the succession ; a right which, we have seen, was before exercised and asserted in the reign of Henry the fourth, Henry the seventh, Henry the eighth, Queen Mary, and Queen Elizabeth.

The first instance, in point of time, is the famous bill of exclusion, which raised such a ferment in the latter end of the reign of King Charles the second. It is well known that the purport of this bill was to have set aside the king’s brother and presumptive heir, the Duke of York, from the succession, on the score of his being a Papist ; that it passed the house of commons, but was rejected by the lords ; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things : 1. That the crown was universally acknowledged to be hereditary, and the inheritance infeasible unless by parliament ; else it had been needless to prefer such a bill. 2. That the parliament had a power to

(*i*) Com. Journ. 8th May, 1660.

[have defeated the inheritance: else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety of an exclusion. However, as the bill took no effect, King James the second succeeded to the throne of his ancestors; and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which, with other concurring circumstances, brought on the Revolution in 1688.

The true ground and principle upon which that memorable event proceeded was an entirely new case in politics, which had never before happened in our history,—the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeasance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament; it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses came to this resolution: “That King James
“ the second, having endeavoured to subvert the constitu-
“ tion of the kingdom, by breaking the original contract
“ between king and people—and, by the advice of jesuits
“ and other wicked persons, having violated the funda-
“ mental laws, and having withdrawn himself out of this
“ kingdom—has abdicated the government, and that the
“ throne is thereby vacant”(k). Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the Conquest had lasted above six hundred years, and from the union of the Heptarchy in King Egbert almost nine hundred. The facts themselves thus appealed to, the king’s endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious;

(k) Con. Journ. 7th Feb. 1688.

[and the consequences drawn from these facts,—namely, that they amounted to an abdication of the government, which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant,—it belonged to our ancestors to determine. For, whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to which we may resort. And that these consequences were fairly deduced from these facts, our ancestors solemnly determined, in a full parliamentary convention, representing the whole society. The reasons upon which they so decided, may be found at large in the parliamentary proceedings of the times; but we ought in the present day rather to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience: because that might imply a right of dissenting or revolting from it, by those who should think it to have been unjust, oppressive, or inexpedient. Whereas, our ancestors having most indisputably had a competent jurisdiction to decide this great and important question, and having in fact decided it, it became the duty of those who came after them to acquiesce in their determination; being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.

But while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation which naturally arose from its equity;—that, however it might in some respects go beyond the letter of our antient laws, it was agreeable to the spirit of our constitution and the rights of human nature:—and that though in other points, (owing to the peculiar circumstances of things and persons,) it was not altogether so perfect as might have been wished, yet from

[thence a new era commenced, in which the bounds of prerogative and liberty became better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other earlier period of the English history. In particular it is worthy of observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of King James amounted to an endeavour to subvert the constitution ; and not to an actual subversion, or total dissolution of the government ; which —according to the principles of Mr. Locke—would have reduced the society almost to a state of nature ; would have levelled all distinctions of honour, rank, offices, and property ; would have annihilated the sovereign power, and in consequence have repealed all positive laws ; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity (*l*). They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne ; whereby the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though King James was no longer king (*m*). And thus the constitution was kept entire ; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

This single postulatum, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For if the throne be at any time vacant (which may happen by other means besides that of abdication ; as if all the blood royal should fail, without any successor appointed by parliament) ; if, we say, a vacancy by any

(*l*) See Locke on Gov. p. 2, c. 19. (*m*) Law of Forfeiture. 118, 119.

[means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, as the trustees and representatives of the nation. For there are no other hands in which it can so properly be entrusted; and there is a necessity of its being entrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner as they judged the most proper. And this was done by their declaration of 12th February, 1688, in the following manner:—"that William and Mary, prince and princess of Orange, be and be declared king and queen, to hold the crown and royal dignity during their lives, and the life of the survivor of them; and that the sole and full exercise of the legal power be only in, and executed by, the said prince of Orange, in the names of the said prince and princess, during their joint lives; and after their deceases the said crown and royal dignity to be to the heirs of the body of the said princess: and for default of such issue, to the Princess Anne of Denmark and the heirs of her body; and for default of such issue, to the heirs of the body of the said prince of Orange" (*n*).

Perhaps, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood; but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any further from the antient line than temporary necessity and self-preservation required. They therefore settled the crown first on King William and Queen Mary, King James's eldest daughter, for their joint lives; then on the survivor of them; and then on the issue of Queen Mary:

(*n*) Com. Journ. 12th Feb. 1688.

[upon failure of such issue, it was limited to the Princess Anne, King James's second daughter, and her issue; and, lastly, on failure of that, to the issue of King William, who was the grandson of Charles the first, and nephew as well as son-in-law of King James the second, being a son of Mary his eldest sister. This settlement included all the protestant posterity of King Charles the first, except such other issue as King James might at any time have; which was totally omitted, through fear of a popish succession. And this order of succession took effect accordingly.

These three princes, therefore, King William, Queen Mary, and Queen Anne, did not take the crown by hereditary right or *descent*, but by way of donation or *purchase*, in the technical sense. The new settlement did not merely consist in excluding King James, and the person pretended to be Prince of Wales, and then suffering the crown to descend in the old hereditary channel; for the usual course of descent was in some instances broken through, and yet the convention still kept in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and King James had left no other issue than his two daughters, Queen Mary and Queen Anne. It would have stood thus: Queen Mary and her issue; Queen Anne and her issue; King William and his issue. But we may remember that Queen Mary was only nominally Queen, jointly with her husband King William, who alone had the regal power; and King William was personally preferred to Queen Anne, though his issue was postponed to hers. Clearly therefore these princes were successively in possession of the crown, by a title different from the usual course of descents.

It was towards the end of King William's reign, when all hopes of any surviving issue from any of these princes died with the duke of Gloucester, the last surviving child of the Princess Anne, that the king and parliament thought

[it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy of the throne; which must have ensued upon their deaths, as no provision was made at the Revolution further than for the issue of Queen Mary, Queen Anne and King William. The parliament had previously, by the statute of 1 W. & M. sess. 2, c. 2, enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, profess the popish religion, or marry a papist,—should be excluded from, and be for ever incapable to inherit, possess, or enjoy the crown; and that in such case the people should be absolved from their allegiance; and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person so reconciled, holding communion, professing, or marrying, were naturally dead. To act therefore consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the Princess Sophia, electress and duchess dowager of Hanover, the most accomplished princess of her age (*o*). For, upon the impending extinction of the protestant posterity of Charles the first, the old law of regal descent directed them to recur to the descendants of James the first; and the Princess Sophia, being the youngest daughter of Elizabeth, queen of Bohemia, who was the daughter of James the first, was the nearest of the antient blood royal, who was not incapacitated by professing the popish religion. On her, therefore, and the heirs of her body, being protestants, the remainder of the crown, expectant on the death of King William and Queen Anne without issue, was settled by statute 12 & 13 Will. III. c. 2.

(*o*) Sandford, in his genealogical history, published A.D. 1677, speaking (p. 535) of the princesses Elizabeth, Louisa, and Sophia, daughters of the Queen of Bohemia, says, the

first was reputed the most learned, the second the greatest artist, and the last one of the most accomplished ladies in Europe.

[And at the same time it was enacted, that whosoever should hereafter come to the possession of the crown should join in the communion of the Church of England, as by law established.

This is the last limitation of the crown that has been made by parliament; and these several actual limitations, from the time of Henry the fourth to the present, do clearly prove the power of the king and parliament to new-model or alter the succession. And indeed it is now again made highly penal to dispute it. For by the statute 6 Anne, c. 7, it is enacted, that if any person maliciously, advisedly and directly, shall maintain, by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the crown and the descent thereof, he shall be guilty of treason; or if he maintains the same by only preaching, teaching, or advised speaking, shall incur the penalties of a *præmunire*.]

The Princess Sophia dying before Queen Anne, the inheritance thus limited descended on her son and heir George the first; and having on the death of Anne taken effect in his person, from him it descended to George the second; from him to his grandson and heir, George the third; from him to his son George the fourth; who was succeeded by his brother William the fourth; and from the monarch last mentioned, the crown descended to his heiress,—the daughter of his brother Edward, Duke of Kent—our present gracious sovereign Queen Victoria.

[Hence it is easy to collect, that the title to the crown is at present hereditary, though not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was King Egbert; afterwards William the Conqueror; and now it is the Princess Sophia, in whom the inheritance was vested by the new king and parliament. Formerly the

[descent was absolute, and the crown went to the next heir without any restriction; but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only of the body of the Princess Sophia as are protestant members of the Church of England, and are married to none but protestants.

In the due medium which has been explained between a merely elective body on the one hand, and absolute hereditary right on the other, consists the true constitutional notion of the right of succession to the imperial crown of these kingdoms. The extremes between which it steers, are each of them equally destructive of those ends for which societies 'were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may, by the express provision of the laws, be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such a hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and in duration, it is to be hoped, the most permanent. It was the duty of an expounder of our laws to lay this constitution before the reader in its true and genuine light; it is the duty of every good Englishman to understand, to revere, to defend it.]

CHAPTER IV.

OF THE ROYAL FAMILY.

It is to be observed that when a female sits on the throne of these realms in her own right, she is styled queen *regnant*. Such were the first (and perhaps the second) Queen Mary, Queen Elizabeth and Queen Anne; and such is our present gracious sovereign. And a queen regnant has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king; as is indeed expressly declared by statute 1 Mary I. sess. 3, c. 1 (*a*). But the wife of a reigning king is styled the queen *consort*, and she, by virtue of her marriage, is participant of divers prerogatives above other women (*b*).

[And, first, she is a public person, exempt and distinct from the king; and not, like other married women, so closely connected, as to have lost all legal or separate existence so long as the marriage continues. For the queen consort is of ability to purchase lands and to convey them, to make leases, to grant copyholds, and do other acts of ownership, (without the concurrence of her lord,) which no other married woman can do (*c*); a privilege as old as the Saxon era (*d*). She is also capable at

(*a*) Mary being the first queen that sat upon the English throne, this statute was passed, as it declares, for “the extinguishment of “the doubt and folly of malicious “and ignorant persons,” who might be induced to think that a queen

could not exercise all the prerogatives of a king. (1 Bl. Com. p. 218 *in notis*.)

(*b*) Bl. Com. ubi sup.; Finch, L. 86.

(*c*) 4 Rep. 23.

(*d*) Seld. Jan. Angl. l. 42.

[common law of taking a grant from the king (*e*); which no other wife is from her husband; and in this particular she agrees with the *Augusta* or *piissima regina conjux divi imperatoris*, of the Roman laws; who, according to Justinian, was equally capable of making a grant to, and receiving one from, the emperor (*f*). Moreover the queen consort of England hath separate courts and offices distinct from those of the king, not only in matters of ceremony, but even of law; and her attorney and solicitor-general are entitled to a place within the bar of his majesty's courts, together with the king's counsel (*g*). She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not a married woman (*h*). For which the reason given by Sir Edward Coke is this; because the wisdom of the common law would not have the king (whose continual care and study is for the public, and *circa ardua regni*,) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

The queen consort hath also many exemptions and minute prerogatives. For instance, she pays no toll: nor is she liable to any amercement in any court (*i*). But in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects; being to all intents and purposes the king's subject, and not his equal: in like manner, as in the imperial law, "*Augusta legibus soluta non est*" (*k*).

(*e*) See 2 Geo. 3, c. 1; 15 Geo. post, bk. v. c. III.

3, c. 33; 39 & 40 Geo. 3, c. 88; 47 (*h*) Finch, L. 86; Co. Litt. 133.

Geo. 3, st. 2, c. 45.

(*i*) Co. Litt. ubi sup.; Finch,

(*f*) Cod. 5, 16, 26.

L. 185.

(*g*) Seld. Tit. Hon. 1, 6, 7; et vide

(*k*) Ff. i. 3, 31.

[The original revenue of our queens consort, before and soon after the Conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in Domesday-book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen (*m*). These were frequently appropriated to particular purposes: to buy wool for her majesty's use, to purchase oil for her lamps, or to furnish her attire from head to foot (*n*); which was frequently very costly, as one single robe in the fifth year of Henry the second stood the city of London in upwards of fourscore pounds! (*o*). A practice somewhat similar to that of the eastern countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel (*p*). And for a further addition to her income, the duty of queen-gold (*aurum reginæ*) is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the crown by the powerful intercession of the queen. For this queen-gold was due on every voluntary offering or fine to the king amounting to ten marks and upwards, in consideration of any privileges, grants, licences, pardons, or other matters of royal favour, in the proportion of one-tenth of such offering or fine (*q*). But it was not payable in respect of any aid or subsidy granted by parliament or convocation; nor on fines imposed by courts on offenders; nor on any voluntary present to the king without consideration moving from him to the subject; nor on any sale or contract whereby the revenues or possessions of the

(*m*) See Pryn. Append. to Aur. Reg. 2, 3.

(*n*) Domesd. ib.; Mag. Rot. Pip. 2 Hen. 2; Madox, Hist. Exch. 419.

(*o*) Mag. Rot. 5 Hen. 2; Madox, ubi sup. 250.

(*p*) Cic. in Verrem, l. 3, c. 33.

(*q*) Pryn. Aur. Reg. 2.

[crown were granted away or diminished (*r*). There are traces, though obscure, of the payment of queen-gold in the book of Domesday, and in the great pipe-roll of Henry the first (*s*). In the reign of Henry the second, the manner of collecting it appears to have been well understood, and it forms a distinct head in the antient Dialogue of the Exchequer (*t*), written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen consorts of England till the death of Henry the eighth; though, after the accession of the Tudor family, the collecting of it seems to have been much neglected; and there being no queen consort afterwards till the accession of James the first, a period of nearly sixty years, its very nature and quantity became then a matter of doubt; and being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable, that his consort Queen Anne (though she claimed it), yet never thought proper to exact it (*u*). In 1635, in the eleventh year of Charles the first, a time fertile of expedients for raising money upon dormant precedents in our old records, (of which ship money was a fatal instance,) the king, at the petition of his queen, Henrietta Maria, issued out his writ for levying it (*x*); but afterwards purchased it of his consort, at the price of ten thousand pounds; finding it perhaps too trifling and troublesome to levy. And when afterwards, at the Restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. Prynne, by a treatise which does honour to his abilities as a painful and judicious

(*r*) 12 Rep. 21; 4 Inst. 358; Pryn. 6; Madox, Hist. Exch. 242.

(*s*) See Madox, Disceptat. Epistol. 74; Pryn. Aur. Reg. Append. 5.

(*t*) Lib. 2, c. 26.

(*u*) Mr. Prynne, with some appearance of reason, insinuates that their researches were very superficial. Aur. Reg. 125.

(*x*) 19 Rym. Feod. 721.

[antiquary, endeavour to excite Queen Catherine to revive this antiquated claim.

Another antient perquisite belonging to the queen consort, mentioned by all our old writers (*a*), and for that reason, only, worthy of notice, is this: that, on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "*De sturgione observetur, quod rex illum habebit integrum; de balenâ vero sufficit, si rex habeat caput, et regina caudam*" (*b*).

But further; though the queen consort is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. III.) to compass or imagine the death of our lady the king's companion, as of the king himself: and to violate, or defile, the queen consort amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the eighth made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof (*c*): but this law was soon after repealed (*d*), it trespassing too strongly as well on natural justice, as female modesty. If, however, the queen (whether consort or dowager) be accused of any species of treason, she shall be tried by the peers of parliament; as Queen Anne Boleyn was, in the twenty-eighth year of Henry the eighth.]

(*a*) Braeton, l. 3, c. 3; Britton, c. 17; Flet. l. 1, c. 45, 46.

(*b*) The reason of this whimsical division assigned by our antient records, was to furnish the queen's wardrobe with whalebone (see Pryn. Ann. Reg. 127); but this reason is more whimsical than the division, for the whalebone lies entirely in

the head. (Christian's Blackstone, vol. i. p. 222.)

(*c*) Stat. 33 Hen. 8, c. 21.

(*d*) Mr. Christian (*ubi sup.*) says, that it was not repealed till the 1 Edw. 6, c. 12, which abrogated all treasons created since the memorable statute in the twenty-fifth year of Edward the third.

It is to be observed, that the husband of a queen *regnant* is her subject, as Prince George of Denmark was to Queen Anne, and as his late royal highness Prince Albert, (under the title of the Prince Consort,) was to her Majesty (*e*).

A queen *dowager* is the widow of the king, and, as such, retains most of the privileges which belonged to her as queen consort; though it is not high treason to conspire her death, or to violate her chastity, because the succession to the crown is not thereby endangered. [Yet still, *pro dignitate regali*, no man may marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods; which, Sir Edward Coke tells us, was enacted in parliament in the sixth year of Henry the sixth, though the statute be not in print (*f*). A queen dowager, alien born, is entitled by the common law to dower after the king's demise, though the alien wife of a subject was not, at one time, entitled in all cases to claim dower. Again, a queen dowager, if she marry a subject, doth not lose her regal dignity, as peeresses dowager, when commoners by birth, lose their peerage when they marry commoners. For Catherine, the widow of King Henry the fifth, though she married a private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor, yet by the name of Catherine, "queen of England," maintained an action against the bishop of Carlisle. And so, the queen dowager of Navarre, marrying with Edmund Earl of Lancaster, brother to King Edward the first, maintained an action of dower (after the death of her second husband) by the name of Queen of Navarre (*g*).

(*e*) The Act of naturalization of Prince Albert (3 & 4 Vict. c. 2) required, in the usual form, that he should take the oaths of allegiance and supremacy.

(*f*) 2 Inst. 18; Riley's Plac. Parl. 72; Co. Litt. 31. Mr. Hargrave, in

a note to Co. Litt. 133, says, that no such statute can be found. Lord Coke there refers to it by 8 Hen. 6, No. 7; in 2 Inst. 18, by 6 Hen. 6, No. 41. In Riley's Plac. Parl. it is called 2 Hen. 6.

(*g*) 2 Inst. 60.

[The Prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the sovereign, are all likewise peculiarly regarded by the laws (*l*). For, by statute 25 Edw. III. to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much treason as to conspire the death of the king, or violate the chastity of the queen. And this, because the Prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy: and the eldest daughter of the sovereign is also inheritable as sole heir to the crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters (*m*); insomuch that upon this, united with other (feudal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent to the crown is usually made Prince of Wales (*n*) and Earl of Chester, by special creation and investiture, *i. e.* by letters patent under the great seal (*o*); but, being the sovereign's eldest son, he is, by inheritance, Duke of

(*l*) The undermentioned annuities (charged on the consolidated fund) have from time to time, as occasion required, been granted by parliament to members of the royal family: The *Princess Royal*, 8,000*l.* (20 & 21 Vict. c. 2); the *Princess Alice*, 6,000*l.* (24 Vict. c. 15); the *Prince of Wales*, 40,000*l.* (26 & 27 Vict. c. 1); the *Princess Helena*, 6,000*l.* (29 & 30 Vict. c. 7); the *Prince Alfred (Duke of Edinburgh)*, 15,000*l.* (29 & 30 Vict. c. 8), and 10,000*l.* (36 & 37 Vict. c. 80); the *Princess Mary of Cambridge*, 2,000*l.* (29 & 30 Vict. c. 48); the *Princess Louise*, 6,000*l.* (34 Vict. c. 1); the *Prince Arthur*, 15,000*l.* (34 & 35 Vict. c. 64.)

(*m*) This statute perhaps was not meant to be extended to the princess royal when she had younger brothers living; for the issue of their wives must inherit the crown before the issue of the princess royal; yet their chastity is not protected by the statute.

(*n*) This creation has not been confined to the heir apparent, for both Queen Mary and Queen Elizabeth were created by their father Henry the eighth, Princesses of Wales; each of them at the time, (the latter after the illegitimation of Mary,) being heir *presumptive* to the crown. (4 Hume, 113.)

(*o*) 1 Bl. Com. p. 224.

[Cornwall (during the life of the sovereign), without any new creation (*p*).

The rest of the royal family may be considered in two different lights, according to the different senses in which the term royal family is used. The larger sense includes all those who are by any possibility inheritable to the crown. Such, before the Revolution, were all the descendants of William the Conqueror, who had branched into an amazing extent, by intermarriages with the antient nobility. Since the Revolution and Act of Settlement, it means the Protestant issue of the Princess Sophia. The more confined sense includes only those, who are within a certain degree of propinquity to the reigning prince, and to whom, therefore, the law pays an extraordinary regard and respect; but after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer lines. For though collateral consanguinity is regarded indefinitely, with respect to inheritance or succession, yet by the natural constitution of things and the dictates of positive law, it is and can only be regarded within some certain limits, in any other respect (*q*).

The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were therefore little farther regarded by the antient law, than to give them, to a certain degree, precedence before all peers and public officers, as well

(*p*) The Prince's case, 8 Rep. 1; Seld. Tit. of Hon. 2, 5; and see *Simpson v. Clayton*, 4 Bing. N. C. 758; *Clayton v. Lord Grey*, 1 Arnold, 312, n. (*c*). As to leasing, selling or exchanging the property of the Prince of Wales, in his duchy of Cornwall, see 7 & 8 Vict. c. 65; 25 & 26 Vict. c. 49; 26 & 27 Vict. c. 49; and 31 & 32 Vict. c. 35. As

to his mines there, see 21 & 22 Vict. c. 109. And as to limitation of suits by him in relation to his real property in the duchy, see 9 Geo. 3, c. 16; 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; 24 & 25 Vict. c. 62, s. 2.

(*q*) See Essay on Collateral Consanguinity, in *Law Tracts*, 4to. Oxon. 1771.

[ecclesiastical as temporal. This is done by the statute 31 Henry VIII. c. 10, which enacts that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew—which Sir Edward Coke explains to signify grandson or *nepos* (*r*)—or brother's or sister's son. Therefore, after these degrees are past, peers or others of the blood royal are entitled to no place or precedence, except what belongs to them by their personal rank or dignity: which made Sir Edward Walker complain, that by the hasty creation of Prince Rupert to be Duke of Cumberland, and of the Earl of Lenox to be the duke of that name, previous to the creation of King Charles's second son, James, to be Duke of York,—it might happen that their grandsons would have precedence of the grandsons of the Duke of York (*s*).

Indeed under the description of the king's children his grandsons are held to be included, without having recourse to Sir Edward Coke's interpretation of "nephew;" and therefore when King George the second created his grandson Edward, the second son of Frederick Prince of Wales, deceased, Duke of York, and referred it to the house of lords to settle his place and precedence, they certified that he ought to have place next to the late Duke of Cumberland, the then king's youngest son; and that he might have a seat on the left hand of the cloth of estate (*t*). But when, on the accession of King George the third, those royal personages ceased to take place as the children, and ranked only as the brother and uncle, of the king, they also left their seats on the side of the cloth of estate: so that when the Duke of Gloucester, his majesty's second

(*r*) 4 Inst. 362.

(*s*) Tracts, p. 301.

(*t*) Lords' Journ. 24th April,

1760.

[brother, took his seat in the house of peers (*u*), he was placed on the upper end of the earls' bench (on which the dukes usually sit), next to his royal highness the Duke of York. And in 1718, upon a question referred to all the judges by King George the first, it was resolved, by the opinion of ten against the other two, that the education and care of all the king's grandchildren, while minors, did belong of right to his majesty, as king of this realm, even during their father's life (*x*). But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges more recently concurred in opinion, that this care and approbation extended also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend they did not find precisely determined (*y*). The most frequent instances of the crown's interposition go no further than nephews and nieces; but examples are not wanting of its reaching to more distant collaterals (*z*). And the statute 6 Henry VI. before mentioned, which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it (*a*): "because the disparagement of the queen shall give greater comfort and example to other ladies of estate, who are of the blood royal, more lightly to disparage themselves" (*b*). Therefore by the statute 28 Hen. VIII. c. 18, (repealed among other statutes of treasons, by 1 Edw. VI. c. 12,) it was

(*u*) Lords' Journ. 10th Jan. 1765.

(*x*) Fortesc. Al. 401—440. The authorities and arguments of the two dissenting judges, Price and Eyre, are so full and cogent that, if this question had arisen before the judges were independent of the crown, one would have been inclined to have suspected the sincerity of the other ten, and the authority of the decision. See Harg. St. Tr. vol. xi. 295.

(*y*) Lords' Journ. 28th Feb. 1772.

(*z*) A variety of examples are cited by Blackstone, vol. i. p. 226, *in notis*.

(*a*) The occasion of this statute was the before-mentioned marriage of Catherine, mother to Henry the sixth, with Owen Tudor, vide sup. p. 449.

(*b*) Ril. Plac. Parl. 672.

[made treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paternâ*, or the children of his brethren or sisters; being exactly the same degrees to which precedence is allowed by the statute 31 Hen. VIII. before mentioned. And now, by statute 12 Geo. III. c. 11, no descendant of the body of King George the second, (other than the issue of princesses married into foreign families,) is capable of contracting matrimony without the previous consent of the sovereign, signified under the great seal and declared in council: and any marriage contracted without such consent is void; and all persons solemnizing, assisting, or being present at any such prohibited marriage, incur the penalties of the statutes of *præmunire*. It is, however, provided that such of the said descendants as are above the age of twenty-five may, after a twelvemonth's notice given to the privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage.]

CHAPTER V.

OF THE ROYAL COUNCILS, AND OF THE OFFICERS
OF STATE.

THE fourth point of view, in which we are to consider the sovereign, is with regard to his councils. For, in order to assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with.

1. The first of these is the high court of parliament, whereof we have already treated at large (*a*).

2. [Secondly, all the peers of the realm are by their birth hereditary counsellors of the crown, and may be called together by the sovereign to impart their advice in matters of importance to the realm, either in time of parliament, or (which hath been their principal use) when there is no parliament in being (*b*). Accordingly Bracton, speaking of the nobility of his time, says they might probably be called "*consules, a consulendo; reges enim tales sibi associant ad consulendum*" (*c*). And in our law books it is laid down, that peers are created for two reasons: 1, *ad consulendum*, 2, *ad defendendum, regem*; on which account the law gives them certain great and high privileges; such as freedom from arrest in civil cases, even when no parliament is sitting: because it intends, that they are always assisting the sovereign with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour (*d*).

(*a*) Vide sup. p. 318.

(*b*) Co. Litt. 110.

(*c*) L. 1, c. 8.

(*d*) See 7 Rep. 34; 9 Rep. 49;
12 Rep. 96.

[Instances of conventions of the peers, to advise the crown, have been in former times very frequent, though now fallen into disuse by reason of the more regular meetings of parliament. Sir Edward Coke (*e*) gives us an extract of a record, 5 Hen. IV., concerning an exchange of lands between the king and the Earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament, (if any should be called before the feast of Saint Lucia,) or otherwise by advice of the grand council of peers, which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting, are to be found under our antient kings; though the formal mode of convoking them had been so long left off, that when King Charles the first, in 1640, issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the Earl of Clarendon mentions it as a new invention, not before heard of; that is, as he explains himself, so old that it had not been practised in some hundreds of years (*f*). But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with King James the second, after the landing of the Prince of Orange; and with the Prince of Orange himself, before he summoned that convention parliament which afterwards called him to the throne.

Besides this general meeting, it is usually looked upon to be the right of each particular peer of the realm to demand an audience of the sovereign; and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore,

(*e*) 1 Inst. 110.

(*f*) Hist. b. 2.

[in the reign of Edward the second, it was made an article of impeachment in parliament against the two Hugh Spencers, father and son, for which they were banished the kingdom, “that they by their evil covin would not “suffer the great men of the realm, the king’s good counsellors, to speak with the king, or to come near him : “but only in the presence and hearing of the said Hugh “the father and Hugh the son, or one of them, and at “their will, and according to such things as pleased “them”(g).

3. A third council belonging to the sovereign are, according to Sir Edward Coke, his judges of the courts of law, for law matters (h). And this appears frequently in our statutes, particularly 14 Edward III. c. 5, and in other books of law. For when the king’s council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam*. And therefore when by stat. 16 Rich. II. c. 5, it was made a high offence to import into this kingdom any papal bulls, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the king and his council to answer for such offence; here, by the expression of the “king’s council” must be understood the judges of his courts of justice, the subject-matter being legal; this being the general way of interpreting the word council (i).

4. But the principal council belonging to the sovereign is his privy council, which is generally called by way of eminence, *the council*. And this, according to Sir Edward Coke’s description of it (k), is a noble, honourable and reverend assembly of the king, and such as he wills to be of his privy council, in the king’s court or palace. The sovereign’s will is the sole constituent of a privy councillor; and this also regulates their number, which of antient time

(g) 4 Inst. 53.

(h) 1 Inst. 110; 4 Rep. 56 a.

(i) 3 Inst. 125.

(k) 4 Inst. ubi sup.

[was twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch. And therefore King Charles the second, in 1679, limited it to thirty; whereof fifteen were to be the principal officers of the state, and those to be councillors *virtute officii*; and the other fifteen were composed of ten lords and five commoners of the king's choosing (*l*). But since that time the number has been much augmented, and now continues indefinite.] No inconvenience, however, arises from this extension of number, as, with the exception of such of them as are called *cabinet ministers*, the privy councillors are not in modern practice ordinarily summoned to advise the sovereign on affairs of state. The cabinet ministers (or cabinet council) are those privy councillors who, being more immediately honoured with the sovereign's confidence, actually conduct the business of the government, and assemble for that purpose from time to time, as the public exigencies require. It is this body, and not the privy council at large, that is always understood when mention is made of the king's (or queen's) "administration,"—though strangely enough, it is a body unknown to the law, and one whose members are never officially made known to the public, nor its proceedings recorded (*m*). Each of its members is usually invested with one of the principal offices of state, among which are the following:—those of the lord high chancellor; of the first lord of the treasury; of the lord president of the council; of the lord privy seal; of the first lord of the admiralty (*n*); of the chancellor of the exchequer;

(*l*) Temple's Mem. part 3.

(*m*) Lord Macaulay's Hist. of Eng. vol. i. p. 220. See also Hallam's Hist. vol. 3, c. xv. as to the origin of the *Cabinet* as distinct from the general body of the Privy Council, and the effect of the change on the individual responsibility of members of the government.

(*n*) Commissioners are now usually appointed to execute the ancient office of "Lord High Admiral of the United Kingdom." As to the power of the board of admiralty to acquire land for the public service, see 27 & 28 Vict. c. 57. As to proceedings instituted by the admiralty concerning naval, victual-

and of the five principal secretaries of state(*o*), viz.—the secretary for the home department, for foreign affairs, for the colonies, for the war department(*p*), and for India(*q*).

Privy councillors are made by the sovereign's nomination, without either patent or grant(*r*); and, on such nomination, they become privy councillors (with the title of "right honourable") during the life of the sovereign that chooses them, but subject to removal at his discretion.

[The duty of a privy councillor appears from the oath of office(*s*), which consists of seven articles:—1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, meed, doubt or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep, and do, all that a good and true counsellor ought to do to his sovereign lord(*t*).]

ling, or other royal stores under the charge or control of the department, and its liability to pay and receive costs therein, see 31 & 32 Vict. c. 78.

(*o*) As to the office of secretary of state, see *Entick v. Carrington*, 2 Wils. 289. It may be observed here that the office of secretary for the war department was created on the occasion of the Crimean war (see 18 & 19 Vict. c. 117). Before that time there was a secretary *at war*, whose office was finally abolished by 26 & 27 Vict. c. 12; but he was not a principal secretary of state. By 21 & 22 Vict. c. 106, s. 4, any four of her Majesty's principal secretaries of state, and any four *under secretaries*, may sit and vote

as members of the House of Commons, but not more than four of either may sit in the house at the same time. As to this enactment, see 27 & 28 Vict. cc. 21, 34.

(*p*) As to the secretary for the war department, see 18 & 19 Vict. c. 117; 33 & 34 Vict. c. 17.

(*q*) As to the secretary for India, see 21 & 22 Vict. c. 106, s. 3.

(*r*) 1 Bl. Com. p. 230.

(*s*) As to this oath, see 31 & 32 Vict. c. 72, s. 14.

(*t*) By stat. 3 Hen. 7, c. 14, it was formerly felony for any of the king's menial servants to conspire or imagine to take away the life of a privy councillor; and by 9 Anne, c. 16, it was made felony for *any*

Though the privy council at large does not in general assemble to advise on affairs of state, there are other occasions on which it meets to discharge official duties; the summonses in these cases being usually confined however to a certain portion of its members. [It forms part of its jurisdiction to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But its office herein is only to inquire, and not to punish; and all persons committed by it are entitled to their *habeas corpus* by statute 16 Car. I. c. 10, as much as if they had been committed by an ordinary justice of the peace. And by the same statute, the Court of Star Chamber and the Court of Requests, both of which consisted of privy councillors, were dissolved; and it was declared illegal for the council to take cognizance of any matter of property belonging to the subjects of this kingdom.] In addition to its inquisitorial powers, the privy council has also, in certain cases, the *judicial* authority of a court of justice; viz., in colonial causes; in appeals from the lord chancellor in matters of lunacy or idiotcy (*z*); in appeals from the ecclesiastical or maritime courts (*a*); in applications to prolong the term of patents for new inventions (*b*); and in certain cases arising out of the copyright Acts (*c*). [As to colonial causes, it is to be observed, that this jurisdiction is both original and appellate. For whenever a question arises between two provinces out of the realm, as concerning the extent of their charters and the like, the crown in council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty. And so, likewise, when any person

person to attempt to kill or assault, strike or wound one while in the execution of his office. But both statutes are now repealed by 9 Geo. 4, c. 31.

(*z*) *Sheldon v. Fortescue*, 3 P. Wms. 108.

(*a*) 2 & 3 Will. 4, c. 92; 3 & 4

Will. 4, c. 41, ss. 2, 31; 6 & 7 Vict. c. 38.

(*b*) 5 & 6 Will. 4, c. 83; 2 & 3 Vict. c. 67; 7 & 8 Vict. c. 69, s. 2; vide sup. p. 32.

(*c*) 5 & 6 Vict. c. 45, s. 5; 7 & 8 Vict. c. 12; vide sup. pp. 38, 42.

[claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the determination of that right belongs to the sovereign in council; as was the case of the Earl of Derby, with regard to the Isle of Man, in the reign of Queen Elizabeth; and the Earl of Cardigan and others, as representatives of the Duke of Montague, with relation to the Island of St. Vincent, in 1764.] And to the same great tribunal there is, besides, in causes of a certain amount, an appeal in the last resort from the sentence of every court of justice throughout the colonies and other dependencies of the realm (*d*). But under the provisions of modern statutes, all the judicial authority of the privy council is now exercised by a select number of its members, called the Judicial Committee (*e*); and these hear the allegations and proofs, and make their report thereon to her Majesty in council, by whom the judgment is finally given (*f*).

This judicial committee, as constituted by 3 & 4 Will. IV. c. 41, and 14 & 15 Vict. c. 83, s. 15, consists of the lord president of the council, the lord chancellor, the lords justices of appeal, and such other of the members of the privy council at large as shall hold, or shall have held, certain judicial or other offices enumerated in the Acts; or shall be specially appointed to serve on the committee, by the crown. But by the 34 & 35 Vict. c. 91, (a statute

(*d*) This includes the sentences not only of colonial courts of primary jurisdiction, but of courts of appeal also; see 13 & 14 Vict. c. 15, as to the courts of appeal in certain of the West India Colonies.

(*e*) This statute has been amended and extended by 6 & 7 Vict. c. 38, 7 & 8 Vict. c. 69, 8 & 9 Vict. c. 30, 14 & 15 Vict. c. 83, and 34 & 35 Vict. c. 91, in which Acts are contained a variety of regulations as to the manner of proceeding before it, and particularly on appeals from the

colonies. See as to its jurisdiction, *Ex parte Smyth*, 1 Tyr. & Gran. 222; *Pen v. Baltimore*, 1 Ves. sen. 444; *Chesterton v. Farlar*, 7 Ad. & El. 713.

(*f*) Power is reserved in the Judicature Act, 1873, to transfer by order in council the jurisdiction of the Judicial Committee to the Court of Appeal by that Act established. (36 & 37 Vict. c. 66, s. 21. See also sect. 18, as to *admiralty and lunacy* cases.)

passed in the year 1871,) her Majesty was enabled to appoint by warrant under her sign manual four additional judges (each being or having been judge of one of the superior courts at Westminster, or a chief justice in Bengal, Madras or Bombay) to act as members of the judicial committee,—the judges so appointed to hold office during good behaviour, and notwithstanding the demise of the crown, (though removable upon the address of both houses of parliament,) and each to be paid a salary of 5,000*l.* a year.

There are also the following committees of the privy council, exercising jurisdiction on particular subjects, viz.: the committee appointed for the consideration of matters relating to trade and foreign plantations, commonly called the Board of Trade; and the committee for receiving applications for aid from the parliamentary grants for the purpose of education, commonly called the Education Committee (*k*). The Board of Trade is charged with many miscellaneous duties—among others, the comptrolling of corn returns for the purpose of the tithe commutations (*l*), the supervision and regulation of railways (*m*), the superintendence of all matters relating to merchant ships and seamen (*n*), and the discharge of various functions under the Acts for the formation of piers and harbours (*o*), and under such as relate to trading companies and other associations (*p*), and to the copyright of designs (*q*). It is also charged with the carrying out of the

(*k*) 7 & 8 Vict. c. 37; 18 & 19 Vict. c. 131; 19 & 20 Vict. c. 116.

(*l*) See 6 & 7 Will. 4, c. 71, s. 56.

(*m*) 14 & 15 Vict. c. 64.

(*n*) 16 & 17 Vict. c. 129; 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 63.

(*o*) 24 & 25 Vict. c. 45; and see 25 & 26 Vict. cc. 19, 69.

(*p*) 25 & 26 Vict. c. 89.

(*q*) 13 & 14 Vict. c. 104. It may be here remarked, that in addition to the duties mentioned in the

text, the Board also collects and arranges statistical returns, exhibiting the extent of the revenues, commerce, manufactures, and other resources of the kingdom, and containing a variety of useful details of a miscellaneous character. An interesting abstract of some of the information thus collected issued from the Statistical Department of the Board of Trade in April, 1862. See as to *cotton* statistics, 31 & 32 Vict. c. 33. See also 35 & 36 Vict.

provisions relating to life assurance companies contained in the Act concerning such companies, which was passed in 1870 (*r*).

[The dissolution of the privy council depends upon the sovereign's pleasure ; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also, it was dissolved *ipso facto* by the sovereign's demise, as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it has been enacted, by statute 6 Anne, c. 7, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor (*s*).]

c. 18, "An Act for Regulating Inquiries by the Board of Trade."

(*r*) 33 & 34 Vict. c. 61.

(*s*) It is to be observed, however, that the four paid members of the *judicial committee* of the council

appointed under 34 & 35 Vict. c. 91 (vide sup. p. 461), are to retain their offices during good behaviour and notwithstanding the demise of the crown.

CHAPTER VI.

OF THE ROYAL PREROGATIVE.

By the word prerogative we are to understand the character and power which the sovereign hath over and above all other persons, in right of his regal dignity; and which, though part of the common law of the country, is out of its ordinary course. [This is expressed in its very name, for it signifies, in its etymology, something that is required or demanded *before*, or in preference to, all others; and, accordingly, Finch lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject (*a*).] It will now be our business to consider the nature of this prerogative minutely; and, in the first place, to point out the limits within which it is confined, and the safeguards which our political constitution has provided against its improper extension. [For one of the principal excellencies of that constitution, is the limitation of the sovereign's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them without the consent of the people on the one hand, or without on the other a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject.

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the nature and limits of the prerogative; a topic,

(a) Finch, L 85.

[that in some former ages was ranked among the *arcana imperii*, and, like the mysteries of the *bona dea*, was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry. The glorious Queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state (*b*); and it was the constant language of this favourite princess and her ministers, that even that august assembly “ought not to deal, to judge, or to meddle with her majesty’s prerogative royal” (*c*). And her successor King James the first, who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that “as it is atheism and blasphemy in a creature to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what a king may do in the height of his power: good Christians,” he adds, “will be content with God’s will, revealed in his word; and good subjects will rest in the king’s will, revealed in his law” (*d*).

But whatever might be the sentiments of some of our princes, this was never the language of our antient constitution and laws. The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe; though gradually driven out and overborne by violence and chicane in most of the kingdoms on the continent. In support of the same principle, we may refer to the sentiments of Bracton and Fortescue, at the distance of two centuries from each other. And Sir Henry Finch, under Charles the first, after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general

(*b*) D'Ewes, 479.

(*c*) Ibid. 645.

(*d*) King James's Works, 557, 531.

[restriction in regard to the liberties of the people. The king (says he) hath a prerogative in all things that are not injurious to the subject: for in them all it must be remembered, that the king's prerogative stretcheth not to the doing of any wrong. *Nihil enim aliud potest rex, nisi id solum quod de jure potest* (e). And here it may be some satisfaction to remark how widely our own differs from the civil law, with regard to the authority of the laws over the prince, or (as a civilian would rather have expressed it) the authority of the prince over the laws. It is a maxim of the English law, as we are informed by Bracton, that "*rex debet esse sub lege, quia lex facit regem*:" the imperial law will tell us, that "*in omnibus imperatoris excipitur fortuna; cui ipsas leges Deus subjecit*" (f). We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. "*Decet tamen principem*," says Paulus, "*servare leges, quibus ipse solutus est*" (g). This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.

The just limitation of the king's prerogative is indeed essential to the idea of *political or civil liberty*, a subject which shall here be briefly considered. Man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, possesses a right which may be denominated his *natural liberty*. But of this every man gives up a part in consideration of the advantages he gains by becoming a member of society, and consents to conform to those restrictions which the community has thought proper to

(e) Finch, L. 84, 85; Bracton, l. 3, tr. 1, c. 9.

(f) Nov. 105, s. 2.

(g) Ff. 32, 1, 23.

[establish. And this species of legal obedience and conformity, is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases: for, as every other man would also have the same power, there would be no security to individuals in any of the enjoyments of life. *Political*, therefore, or *civil*, liberty (which is that of a member of society) is no other than natural liberty, so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public. Hence we may collect that a law which restrains a man from doing mischief to his fellow creatures, though it diminishes the natural, increases the civil, liberty of mankind;—that any law which would regulate and constrain our conduct in matters of mere indifference, without any good end in view, is destructive of liberty;—but that if any public advantage can arise from observing the precept imposed, the control of our private inclinations, in one or two particular points, will not militate against our general freedom in others of more importance. Thus the statute of King Edward the fourth (*h*), which forbade the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles the second (*i*), which prescribed a thing seemingly as indifferent, viz. a dress for the dead, (who were all ordered to be buried in woollen,) was a law consistent with public liberty, for it was intended to encourage the staple trade of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for, as Mr. Locke has well observed,

(*h*) 3 Edw. 4, c. 5.

(*i*) 30 Car. 2, st. 1, c. 3, repealed by 54 Geo. 3, c. 108.

[where there is no law there is no freedom (*m*): while on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint. Civil liberty, however, may be compromised, not only by the introduction of unreasonable enactments, but by permitting any individual or set of individuals to infringe, at pleasure, those which are once established; and it is then only perfect when the laws are both made in a wise and patriotic spirit, and guarded from infringement by the governing power.

The idea and practice of civil liberty, in this its complete sense, flourish in the highest vigour in these kingdoms; the legislature, and of course the laws, of England being peculiarly adapted to the preservation of this inestimable blessing, even to the meanest subject. Enviably distinguished is the British constitution, in this particular, from those of some other European states, and from the genius of the imperial law; which are often calculated to vest an arbitrary and despotic power of controlling the actions of the subject in the prince or in a few grandees. It is a national happiness, indeed, that long ago attracted the attention and admiration of foreigners (as we may judge from the remark of a learned French author, himself the assertor of freedom), that the English was the only nation in the world where political liberty was the direct end of its constitution (*n*).

The political liberty of England has, however, been at some periods depressed by overbearing and tyrannical princes; while at others, again, it has been so luxuriant as even to tend to anarchy, a worse state than tyranny itself, inasmuch as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments; and, as soon

(*m*) On Government, p. 2, s. 57.

(*n*) Montesquieu, Sp. L. 5.

[as the convulsions consequent on the struggle have been over, the balance of our constitutional liberty has settled to its proper level. The particular rights or liberties at different periods found most liable to the invasions of the prerogative have been, on various occasions of apprehended danger, asserted in parliament. First by the *Great Charter* of liberties, which was obtained sword in hand from King John, and afterwards with some alterations confirmed by King Henry the third, his son: which charter contained very few new grants; but, as Sir E. Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England (*o*). Afterwards by the statute called *Confirmatio Chartarum* (25 Edw. I.), whereby the Great Charter is directed to be allowed as the common law — and all judgments contrary to it are declared void (*p*). Next, by a multitude of subsequent corroborating statutes, from the first Edward to Henry the fourth (*q*). Then, after a long interval, by the *Petition of Right*, (3 Car. I.,) a parliamentary declaration of the liberties of the people assented to by King Charles the first, in the beginning of his reign; — which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *Habeas Corpus Act*, passed under Charles the second (*r*). To these succeeded the *Bill of Rights*, a declaration delivered by the lords and commons to the Prince and Princess of Orange, (13th

(*o*) 2 Inst. proëm.

(*p*) See 1 Bl. Com. p. 128. This statute (as to which vide sup. vol. I. p. 196) not only confirmed Magna Charta, (directing it to be read twice a year in all cathedral churches, and awarding excommunication as the penalty of its infringement,) but enacted that none but the antient aids, tasks or prizes should be taken

but by the common assent of the realm, and for the common profit thereof; — a provision which establishes the great principle of immunity from arbitrary taxation. (See Hallam, Mid. Ages, vol. iii. p. 5, 7th edit.)

(*q*) 2 Inst. ubi sup.

(*r*) 31 Car. 2, c. 2, extended by 56 Geo. 3, c. 100.

[February, 1688,) and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words, “And they do claim, “demand, and insist upon, all and singular the premises, “as their undoubted rights and liberties”(s). And the statute itself (1 W. & M. st. 2, c. 2) recognizes all and singular the rights and liberties, asserted and claimed in the said declaration, to be the “true, antient, and indubitable rights of the people of this kingdom.” Lastly, these liberties were again asserted at the commencement of the eighteenth century, in the *Act of Settlement*,—a statute passed in the twelfth and thirteenth year of the

(s) By this declaration it is asserted:—

1. That the pretended power of suspending of laws, or their execution, by regal authority without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or their execution, by regal authority, as it had been then of late assumed and exercised, is illegal.

3. That the commission for erecting the court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the crown by pretence of prerogative without grant of parliament, for longer time or in other manner than the same is granted, is illegal.

5. That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are protestants may have arms for their defence, suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders. (This provision, respecting the qualification of jurors in cases of treason, was repealed by 6 Geo. 4, c. 50.)

12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, parliaments ought to be held frequently.

[reign of William III. And some new provisions were added, at the same era, for better securing our religion, laws, and liberties (*t*); which the statute declares to be the “birthright of the people of England,” according to the antient doctrine of the common law (*u*).]

There are two of the rights and liberties thus asserted, which are of a nature to require particular notice; as being in the nature of permanent safeguards, provided by our political system for the preservation of the rest. These are:—

1. The constitution, powers, and privileges of parliament, of which we have already spoken at large.

2. The free and uncontrolled dispensation of the law, in the ordinary courts of justice.

[Now since the law is in England the supreme arbiter of every man’s life, liberty, and property, courts of justice

(*t*) In the Act of Settlement (12 & 13 Will. 3, c. 2) it is provided:

1. That whosoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established.

2. That in case the crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged, without the consent of parliament, to engage in any war for the defence of any dominions or territories which do not belong to the crown of England.

3. That judges’ commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but that upon the address of both houses of parliament it may be lawful to remove them. (This provision was confirmed by 1 Geo. 3, c. 23, by which statute the judges’

commissions are also continued notwithstanding the demise of the crown, vide post, p. 473.)

4. That no pardon under the great seal of England, be pleadable to an impeachment by the commons in parliament.

Besides the above provisions, this Act contained others.

As, 1. Against the sovereign going out of the united kingdom without consent of parliament. (Repealed by 1 Geo. 1, sess. 2, c. 51.)

2. As to the matters to be transacted in the privy council. (Repealed by 4 Anne, c. 8, s. 24.)

3. As to aliens naturalized or made denizens. (For the present law on this subject, vide sup. p. 410.)

4. As to officers of the crown sitting in parliament. (See as to this, sup. p. 366.)

(*u*) Plowd. 55.

[must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *Magna Charta* (*y*), spoken in the person of the king, who, in judgment of law, says Sir E. Coke (*z*), is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus, rectum vel justitiam*; “and, therefore, every subject,” continues the same learned author, “for injury done to him *in bonis, in terris, vel personâ*, by any other subject, be he ecclesiastical or “temporal, without any exception, may take his remedy “by the course of the law; and have justice and right for “the injury done to him, freely without sale, fully without any denial, and speedily without delay.” It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows or may know if he pleases; for it depends not upon the will of the crown, or of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. It may be proper, however, to mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. Thus, it is ordained by *Magna Charta* (*a*), that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8, and 11 Rich. II. c. 10, it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right; and though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 20 Edw. III. c. 4. And by 1 W. & M. sess. 2, c. 2, it is declared, that the pretended power of suspending or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

(*y*) C. 29.(*a*) C. 29.(*z*) 2 Inst. 55.

[The method of proceeding cannot, any more than the substance of the law, be altered but by parliament: for if once these outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The sovereign, it is true, may erect new courts of justice, but then they must proceed according to the old established forms of the common law. For which reason it is declared in the statute of 16 Car. I. c. 10, upon the dissolution of the Court of Star Chamber,—that neither his majesty, nor his privy council, have any jurisdiction, power, or authority, by English bill, petition, articles, libel, (which were the course of proceedings in the Star Chamber, borrowed from the civil law,) or by any other arbitrary way whatsoever, to examine or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law.

To the head now under consideration, must be also referred the provisions which have been made to secure the dignity and political independence of the judges. It is enacted by the statute 12 & 13 Will. III. c. 2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) during good behaviour, *quamdiu bene se gesserint*; but that it may be lawful to remove them on the address of both houses of parliament. And afterwards by the statute 1 Geo. III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices notwithstanding any demise of the crown, which was formerly held to vacate their seats (*b*);—and their full salaries also are absolutely secured to them during the continuance of their commissions. It deserves particular remark that, in this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable

(*b*) Ld. Raym. 747; 1 Anne, st. 1, c. 8.

[at pleasure, by the crown, consists one main preservative of the public liberty; which cannot consist long in any state, unless the administration of common justice be rendered secure from the improper influence of the executive power. A danger which (as shown by the history of the Court of Star Chamber) is not by any means imaginary (*d*).

3. The right of petitioning the sovereign, or either house of parliament, for the redress of grievances.

In Russia (we are told) the Czar Peter established a law, that no subject might petition the throne till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death if found to be in the wrong (*e*). The consequence of which was, that no one dared to offer such third petition: and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions (for some there are) which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640.] And the provisions made by the legislature to restrain the abuse of this privilege of the subject will be noticed hereafter, when the offence of tumultuous petitioning is treated of in our fourth volume (*f*).

We will now proceed to consider the proper nature of that prerogative, against the excesses of which the law has so carefully guarded.

Prerogatives—for by this plural use of the word, we commonly express the different branches of that prerogative of which a definition was given at the outset of the

(*d*) Vide sup. p. 460.

(*f*) Vide post, bk. VI. ch. X.

(*e*) Montesq. Sp. L. xii. 26.

chapter—are either *direct* or by way of *exception*. Those by way of exception, are such as exempt the crown from some general rules established for the rest of the community—as, for example, that no costs shall be recovered against the sovereign (*g*); and that his debt shall be preferred before a debt to any of his subjects. These maxims, however, and others of the same class, will be better understood in connection with the rules themselves, to which these prerogatives are exceptions. And therefore, we will at present only dwell upon the sovereign's *direct* prerogatives.

[The direct (or substantive) prerogatives again may be divided into three kinds: being such as regard first, the royal character; secondly, the royal authority; and, lastly, the royal income. These are necessary, to secure reverence to the sovereign's person, obedience to his commands, and an affluent supply for the ordinary expenses of government; without all of which it is impossible to maintain the executive power in due independence and vigour. In the present chapter we shall only consider the two first of these divisions; those, namely, which relate to the sovereign's political character and authority. The other division, which forms the royal revenue, will require a distinct examination; according to the known distribution of the feudal writers, who distinguish the royal prerogatives into the *majora* and *minora regalia*, in the latter of which classes the rights of the revenue are ranked. For, to use their own words, "*majora regalia imperii præ-eminentiam spectant; minora vero ad commodum pecuniarum immediate attinent; et hæc proprie fiscalia sunt, et ad jus fisci pertinent*" (*h*).

(*g*) However, by 16 & 17 Vict. c. 107, s. 263; 18 & 19 Vict. c. 90, ss. 1, 2; and 25 Vict. c. 14, the subject is now allowed his costs from the crown in proceedings under the Acts relating to the *public revenue*;

and by 23 & 24 Vict. c. 34, s. 12, in a *petition of right*, under that Act.

(*h*) Peregrin. de Jure Fisc. l. 1, c. 1, num. 9.

[First, then, as to the political character of the sovereign.

1. It comprises the attribute of *sovereignty* or *pre-eminence*. “*Rex est vicarius*,” says Bracton, “*et minister Dei, in terrâ: omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo*” (i).

The king is said to have imperial dignity; and in charters before the Conquest is frequently styled *basileus* and *imperator*, the titles respectively assumed by the emperors of the east and west (k). His realm is declared to be an empire, and his crown imperial, by many acts of parliament, particularly the statutes 24 Henry VIII. c. 12, and 25 Henry VIII. c. 28: which at the same time declare the king to be the supreme head of the realm, in matters both civil and ecclesiastical; and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not, (as the creation of notaries and the like,) and that all kings were in some degree subordinate and subject to the emperor of Germany or Rome. The meaning therefore of the legislature, when it useth these terms of empire and imperial, and applies them to the realm and crown of England, is only to assert that our sovereign is equally supreme and independent within these his dominions, as any emperor is in his empire; and owes no kind of subjection to any other potentate upon earth (l).]

With the sovereignty of pre-eminence to which we have referred, is connected the exemption from certain disabilities. Thus it was a maxim (even while the now abolished doctrine of corruption of blood on attainder flourished in full vigour) that in the sovereign there could be no stain or corruption of blood; for if the heir to the

(i) L. i. c. 8.

(k) Seld. Tit. of Hon. 1, 2.

(l) “*Rex allegavit, quod ipse*

omnes libertates haberet in regno suo, quas imperator vindicabat in imperio.”—M. Paris, A.D. 1095.

crown were attainted of treason or felony, and afterwards the crown should descend to him, this *ipso facto* would purge the attainder (*m*). [And therefore when Henry the seventh, who, as Earl of Richmond, stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because as Lord Bacon, in his history of that prince, informs us, it was agreed that the assumption of the crown had at once purged all attainders. Neither can the sovereign, in judgment of the common law, as sovereign, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not, in his natural capacity, attained the legal age of twenty-one (*n*). It is true, that, by 28 Hen. VIII. c. 17, power was given to future kings to rescind and revoke all acts of parliament that should be assented to by them while under the age of twenty-four; but this was repealed by 1 Edward VI. c. 11, so far as related to that prince; and both statutes are declared to be determined by 24 Geo. II. c. 24. It hath, however, been usually thought prudent, when the heir-apparent has been very young, to appoint a protector, guardian or regent for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian (*o*).] And the appointment of a regent is to be considered only as an expedient devised to meet a particular contingency, —like the statute in the present reign, which provides for the administration of government by lords justices, in case of the next successor to the crown being out of the realm

(*m*) Finch, L. 82.

(*n*) Co. Litt. 43; 2 Inst. proëm. 3.

(*o*) The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence

alone it may be collected that his office is unknown to the common law; and therefore (says Sir Edward Coke), the surest way is to have him made by authority of the great council in parliament. (4 Inst. 58.)

at the time of the demise of her Majesty (*q*); or that in a former reign, which appointed the heir apparent to the regency, while the sovereign was disabled, by a severe visitation of Providence, from conducting affairs of state (*r*). [Another principle referable to the pre-eminence of the sovereign is, that the law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward or George may die, but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any interregnum or interval, is vested at once in his heir, who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his demise, an expression which signifies merely a transfer of property. For, as is observed in Plowden (*s*), when we say the demise of the crown, (*demissio regis, vel coronæ*), we mean only that, in consequence of the disunion of the sovereign's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus, too, when Edward the fourth, in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his demise; and all process was held to be discontinued, as upon the natural death of the king (*t*).]

2. Another attribute of the royal character is *irresponsibility*; it being an antient fundamental maxim, that *the king can do no wrong* (*u*). This is not to be understood as if every thing transacted by the government was of course just and lawful. Its proper meaning is only this,—that no crime or other misconduct must ever be imputed to the sovereign personally. However tyrannical or arbi-

(*q*) 7 Will. 4 & 1 Vict. c. 72.

(*r*) 51 Geo. 3, c. 1.

(*s*) Plowd. 177, 234.

(*t*) M. 49 Hen. 6, pl. 1—8.

(*u*) 1 Bl. Com. p. 246.

trary, therefore, may be the measures pursued or sanctioned by him, he is himself sacred from punishment of every description. [If any foreign jurisdiction had the power to punish him, as was formerly claimed by the Pope, the independence of this kingdom would be no more; and if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the legislative power. On the same principle, no suit or action can be brought against the sovereign, even in civil matters. Indeed, his immunity, both from civil suit and from penal proceeding, rests on another subordinate reason also, viz. that no court can have jurisdiction over him. For all jurisdiction implies superiority of power, and proceeds from the crown itself. But who, says Finch, shall command the king? (*x*)]

While the sovereign himself however is, in a personal sense, incapable of doing wrong, yet his acts may in themselves be contrary to law, and are in some cases subject to reversal on that ground. For, first, his grants, when they are of that description, are avoided or set aside by the law; but yet in such manner as to maintain the respect due to this inviolable maxim. [Thus if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth or to any private person, the law will not suppose the sovereign to have meant either an unwise or an injurious action, but declares that the sovereign was *deceived* in his grant; and thereupon such grant is rendered void, but merely upon the foundation of fraud or deception either by or upon those agents whom the crown had thought proper to employ. So if any person has in point of property a just demand upon the sovereign, though he cannot bring an action against him, he may petition him in one of his superior courts, and obtain redress

(*x*) Finch, L. 83.

[as a matter of grace, though not upon compulsion (*y*). And this is entirely consonant to what is laid down by the writers on natural law. “A subject,” says Puffendorf, “so long as he continues a subject, hath no way to “oblige his prince to give him his due when he refuses “it, though no wise prince will ever refuse to stand to “a lawful contract. And if the prince gives the subject “leave to enter an action against him upon such contract, in one of his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws” (*z*). For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him.] As to any cause of complaint which a subject may happen to have against the sovereign, in respect of some personal injury of a private kind, but distinct from a mere claim of property, it would seem that this would not be a proper subject for a petition, and that there is consequently no remedy against the crown. But it is well observed by Mr. Locke, that “the harm which the sovereign can do in his own person not being likely to happen often, nor extend itself far; nor being able, by his single strength, to subvert the laws, or oppress the body of the people (should any prince have so much weakness or ill-nature as to endeavour to do it), the inconvenience of some particular mischiefs that may happen sometimes when a heady prince comes to the throne, is well recompensed by the peace of the public and security of government, in the person of the chief magistrate being thus set out of the reach of danger” (*a*).

It is also to be observed, that, notwithstanding this personal perfection which the law attributes to the sovereign, the constitution hath allowed a latitude of supposing the contrary, in respect of both houses of parliament; each of which in its turn hath exerted the right of remonstrating

(*y*) Finch, L. 255.

(*a*) On Government, p. 2. s. 205.

(*z*) Law of N. and N. b. viii. c. 10.

and complaining to the sovereign, even of those acts of royalty which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly treat them in their addresses as proceeding personally from the prince, yet among themselves, (to preserve the more perfect decency and for the greater freedom of debate,) they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly or even through the medium of his reputed advisers) belongs to no individual, but is confined to those august assemblies; and there, too, the objections must be proposed with the utmost respect and deference. One member was sent to the tower for suggesting that his majesty's answer to the address of the commons "contained high words to fright the members out of their duty" (*b*); and another for saying that "a part of the king's speech seemed rather to be calculated for the meridian of Germany than Great Britain, and that the king was a stranger to our language and constitution" (*c*).

Still less are the houses of parliament precluded from imputing blame to those evil councillors or ministers by whose aid or advice any private wrong or public oppression, or other violation of the rights and liberties of the people, may have been practised. For the constitution has provided, that no man shall dare to assist the crown in contradiction to the laws of the land: and any man so offending is liable to be prosecuted and punished through the medium of an indictment or of a parliamentary impeachment.

(*b*) See Com. Journ. 18th Nov. 1685.

(*c*) Ibid. 4th Dec. 1717.

If it be asked what remedy is afforded to the subject for such public oppressions or acts of tyranny as have not in fact been instigated by bad advisers, but have proceeded from the personal delinquency of the monarch himself, the answer is that there is no more remedy than in the case before supposed of a personal injury inflicted by the sovereign on an individual. To suppose a remedy, indeed, in either case, (that is, a compulsory remedy,) would be to suppose a superior coercive authority in some other hand, to correct the abuse; the very notion of which destroys the idea of sovereignty. For such abuses, therefore, whether they spring from the sovereign or from either house of parliament, the law is manifestly unable to make provision; but if ever they unfortunately happen, the prudence of the time must provide new expedients upon new emergencies.

[Indeed, it is found by experience, that whenever unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a State, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to these political maxims, which were originally established to preserve it. And, therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason prevailed. When King James the second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no further, we may now be allowed to lay down the law of redress against public oppression. If, therefore, any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom,—we are now authorized to declare, that this conjunction of circumstances would amount to an

[abdication, and the throne would be thereby vacant. But it is not for us to say, that any one or two of these ingredients would amount to such a situation; for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.]

In further pursuance of the same principle of the sovereign's incapability of doing wrong, the law also determines that in him there can be no negligence or *laches*. *Nullum tempus occurrit regi*, was formerly therefore the standing maxim on all occasions (*d*): and no delay in resorting to his remedy was held to bar the king's right (*e*). From this doctrine it followed, not only that the civil claims of the crown received no prejudice by the lapse of time, but that criminal prosecutions for felonies or misdemeanors, (which are always instituted in the sovereign's name,) might be commenced at any distance of time from the commission of the offence (*f*). And all this is still law in a general point of view; but by statute it has been, in modern times, largely qualified in particular instances. For by 9 Geo. III. c. 16, the crown is now barred from its civil right in suits relating to landed property, by the lapse of sixty years (*g*); and by 32 Geo. III. c. 58, is barred in informations for usurping corporate offices or

(*d*) 1 Bl. Com. p. 247.

(*e*) Finch, L. 82; Co. Litt. 41, b. 90.

(*f*) As to the limitation of time in prosecuting offences against the customs, see *Queen v. Thompson* and others, 20 L. J. (M. C.) 183.

(*g*) This Act has been amended,

in certain respects, by 24 & 25 Vict. c. 62. See also 25 & 26 Vict. c. 53, s. 20; sup. vol. I. p. 698. The subject of limitation of actions in reference to the crown, is more particularly treated, post, bk. v. ch. ix.

franchises, by the lapse of six years (*h*); and by 7 Will. III. c. 3, an indictment for treason, (except for an attempt to assassinate the king,) must be found within three years after the commission of the act of treason.

[Next, as to the royal authority or power—it is a subject which involves a great variety of prerogatives, in the exertion whereof consists the executive part of government. This, by the British constitution, is wisely placed in a single hand, for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The sovereign is therefore not only the chief, but properly the sole, magistrate of the nation; and all others act only by commission from and in due subordination to him.

The reader can be at no loss to reconcile with what has been alleged in the preceding part of this chapter as to the freedom of the British constitution, the following principle, which that constitution no less certainly recognizes, viz., that in the exertion of lawful prerogative, the sovereign is and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him; unless, indeed, where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring, that thus far the prerogative shall go, and no farther. And as to the nature of these prerogatives more particularly considered, they may be arranged as follows:—

1. The sovereign has the sole power of sending am-

(*h*) By the Municipal Corporation Act (7 Will. 4 & 1 Vict. c. 78) applications for a *quo warranto*

must be made under that Act within *one* year after the election or disqualification of the officer (sect. 23).

[bassadors to foreign states and receiving ambassadors at home (*i*). This is in the nature of things incident to his royal capacity. For it is evident that with regard to foreign concerns, the sovereign is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their councils. In the sovereign, therefore, as in a centre, all the rays of his people are united; and form by that union a consistency, splendour, and power, that make him feared and respected by foreign potentates: who might scruple to enter into an engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation; what is done without the royal concurrence is the act only of private men (*k*).

The prerogative which we are now considering naturally leads, though at the expense of a short digression, to the inquiry how far the municipal laws of England intermeddle with or protect the rights of those messengers from one potentate to another, whom we call ambassadors.

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nations,

(*i*) As to the salaries, pensions, &c. of those who are in the diplomatic service, see 32 & 33 Vict. c. 43. It may be remarked here that it having been doubted whether, having regard to the several statutes passed against papal encroachments, diplomatic relations could lawfully be maintained *with the sovereign of the Roman States*, it was thought expedient by 11 & 12 Vict. c. 108, expressly to authorize her Majesty to enter into such relations,—provided that no person in

holy orders in the church of Rome, or jesuit, or member of any other religious order, community, or society of that church, bound by monastic or religious vows, shall be received at the court of London as ambassador or other diplomatic agent; and provided also that nothing in the Act should be taken to repeal, weaken, or affect any laws then in force for upholding the supremacy of the crown, in all matters civil and ecclesiastical.

(*k*) See 4 Inst. 152.

[and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master (*m*); who is bound either to do justice upon him, or avow himself the accomplice of his crimes (*n*). But there is great dispute among the writers on the laws of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder (*o*). Our law seems to have formerly allowed the exemption in the restricted sense only. For it hath been held, both by our common lawyers and civilians, that though an ambassador is privileged by the law of nations, yet—by that law—if he commits any offence against the law of reason and nature, he shall lose his privilege (*p*); and that therefore, if an ambassador conspires the death of the sovereign in whose land he is, he may be condemned and executed for treason; though if he commits any other species of treason, it is otherwise, and he must be sent to his own country (*q*). And these positions seem to be built upon good appearance of reason.

(*m*) As was done with Count Gyllenberg, the Swedish minister to Great Britain, A.D. 1716.

(*n*) Sp. L. 26, 21.

(*o*) Van Leeuwen in Ff. 50, 7, 17; Barbeyrac's Puff. l. 8, c. 9, s. 9, and

17; Van Bynkershoek, De Foro Legator. c. 17, 18, 19.

(*p*) 1 Roll. Rep. 175; 3 Bulstr. 227; 4 Inst. 153.

(*q*) 1 Roll. Rep. 185.

[For since, as we have formerly shown (*r*), all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of, and auxiliary to, that law; therefore to this natural universal rule of justice, ambassadors as well as other men, are subject in all countries; and of consequence it is reasonable that, wherever they transgress it, there they shall be liable to make atonement (*s*). But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime (*t*). And therefore, since the middle of the seventeenth century, few (if any) examples have happened where an ambassador has been punished for any offence, however atrocious in its nature (*u*).

In respect to civil suits, all the foreign jurists agree that neither an ambassador, nor any of his train or *comites*, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside (*x*). Yet

(*r*) Vide sup. vol. i. p. 35.

(*s*) Foster's Discourses, 188.

(*t*) "*Securitas legatorum utilitati quæ ex pœna est præponderat.*"—(De Jure B. et P. l. 2, c. 18, s. 4.)

(*u*) In the year 1654, during the protectorate of Cromwell, Don Pataleon Sa, the brother and secretary of the Portuguese ambassador, was tried, convicted, and executed for an atrocious murder. Mr. Hume (vol. 7, p. 237) observes upon this case, that "the laws of nations were here plainly violated." His view of the facts, however, is erroneous; for he supposes that Don Pataleon Sa was "joined with his brother in the same commission,"—a state-

ment which, (though he cites Thurlow in support of it,) appears to be incorrect. See the Life of Chief Justice Rolle, in Lord Campbell's Lives of the Chief Justices. See also a Treatise De Legati Delinquentis Judice Competente, by Dr. Richard Zouch, one of the delegates who assisted at the trial; by which it appears that if the prisoner could have proved that he was a colleague in the embassy, (according to his plea,) the plea, in the opinion of the doctor at least, must have been allowed.

(*x*) It may be observed, that a "secretary of legation," acting in the absence of the ambassador as chargé d'affaires, is protected in the same manner as the ambassador

[Sir Edward Coke maintains, that if an ambassador make a contract which is good *jure gentium*, he shall answer for it here (*d*). But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law-books are (in general) quite silent upon it previous to the reign of Queen Anne; when an ambassador from Peter the Great, Czar of Muscovy, was actually arrested and taken out of his coach in London, for a debt of fifty pounds, which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The persons who were concerned in the arrest were examined before the privy council, of which the Lord Chief Justice Holt was at the same time sworn a member; and seventeen were committed to prison; most of whom were prosecuted by information in the Court of Queen's Bench, at the suit of the attorney-general; and at their trial before the lord chief justice were convicted of the facts by the jury, the question of law, how far those facts were criminal, being reserved, to be afterwards argued before the judges; which question was never determined (*e*). In the meantime the Czar resented this affront very highly, and demanded that the sheriff of Middlesex, and all others concerned in the arrest, should be punished with instant death (*f*). But queen Anne (to

himself, and does not lose his privilege, (at all events to the extent of being protected against all process,) by engaging in mercantile transactions. See *Taylor v. Best*, 14 C. B. 487; *Att.-Gen. v. Kent*, 1 Hurl. & Colt. 30; *Magdalena Steam Navigation Company v. Martin*, 2 Ell. & Ell. 95, 109.

(*d*) 4 Inst. 153.

(*e*) See *Com. Journ.* 14th, 21st, 25th, 29th July, 23rd October, 1708, and *Boyer's Annals of Queen*

Anne. In 3 Burr. 1480, Lord Mansfield says, the persons convicted were never brought up to receive judgment, "for no punishment would "have been thought by the Czar an "adequate reparation. Such a sentence as the court would have "given, he would have thought an "insult."

(*f*) *Com. Journ.* 17th September, 1708; *Boyer's Annals of Queen Anne*.

[the amazement of that despotic court,) directed her secretary to inform him, “that she could inflict no punishment upon any the meanest of her subjects, unless warranted by the law of the land; and therefore was persuaded that he would not insist upon impossibilities” (*g*). To satisfy, however, the clamours of the foreign ministers (who made it a common cause), as well as to appease the wrath of Peter, a bill was brought into parliament (*h*), and afterwards passed into a law,—to prevent and punish such outrageous insolence for the future (*i*). And with a copy of this Act elegantly embossed and illuminated, accompanied by a letter from the queen, an ambassador extraordinary was commissioned to appear at Moscow; who declared, “that though her majesty could not inflict such a punishment as was required, because of the defect in that particular of the former established constitutions of her kingdom, yet, with the unanimous consent of the parliament, she had caused a new Act to be passed, to serve as a law for the future.” This humiliating step was accepted as a full satisfaction by the Czar; and the offenders, at his request, were discharged from all further prosecution (*h*).

This statute recites the arrest which had “been made in contempt of the protection granted by her majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other

(*g*) Com. Journ. 11th January, 1709; Boyer’s Annals of Queen Anne; Un. Mod. Hist. xxxv. 454.

(*h*) See Com. Journ. 23rd December, 1708.

(*i*) 7 Anne, c. 12. In 3 Burr. 1840, Lord Mansfield declares, that “the statute of Queen Anne was not occasioned by any doubt whether the law of nations, particularly the part relative to public ministers, was not part of the law

“of England, and the infraction criminal; and that it was not thereby intended to vary an iota of such law.” And he proceeds to say, that Lord Talbot, Lord Hardwicke and Lord Holt, were clearly of the same opinion. Moreover, in *Viveash v. Becker*, (3 Man. & Sel. 284,) this statute was held to be declaratory only of the common law and the law of nations.

(*h*) See Boyer, *ubi sup*.

[“ public ministers have at all times been thereby possessed of, and ought to be kept sacred and inviolable;” wherefore it enacts, that for the future all writs and process whereby the person of any ambassador, or of his domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and the persons prosecuting, soliciting, or executing such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any two of them, shall think fit. But it is expressly provided, that no trader, within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by the Act: nor shall any one be punished for arresting an ambassador’s servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex (*m*): exceptions that are strictly conformable to the rights of ambassadors, as observed in the most civilized countries. And in consequence of this statute, thus declaring and enforcing the law of nations, these privileges are now held to be part of the law of the land, and are as such allowed in the courts of common law (*n*).

2. It is also the sovereign’s prerogative to make treaties, leagues and alliances with foreign states and princes (*o*). For it is by the law of nations essential to the goodness of a league, that it be made by the sove-

(*m*) *Seacomb v. Bowlney*, 1 Wils. 20.

(*n*) See 2 Stra. 797; *Seacomb v. Bowlney*, 1 Wils. 20; 3 Wils. 35; *Triquet v. Bath*, 1 Bl. Rep. 471; *Viveash v. Becker*, 3 M. & S. 284. It may be observed, that so much of this Act as refers to the arrest of the *person* has become of less impor-

tance since the recent abolition of arrest for debt, except in the exceptional cases provided for by the Debtor’s Act, 1869 (32 & 33 Vict. c. 62).

(*o*) Com. Dig. Prerogative, B. 2, 3; 1 Chitty’s Commercial Law, 38, 615.

[reign power (*p*); and then it is binding upon the whole community; and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check by the means of parliamentary impeachment; for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.]

3. Upon the same principle the sovereign has also the prerogative of making war and peace (*q*). For it is held by the writers on the law of nations, that the right of making war, which by nature subsisted in every individual, has become vested in the sovereign power of each society (*r*); and that this right is given up, not only by individuals but even by the entire body of a people that are under the dominion of a sovereign. [It would indeed be extremely improper that any number of subjects should have the power of binding the supreme magistrate, and putting him, against his will, in a state of war. Whatever hostilities therefore may be committed by private citizens, the State ought not to be affected thereby; unless it should justify their proceedings. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers (*s*); according to that rule of the civil law, "*hostes hi sunt, qui nobis, aut quibus nos, publice bellum decrevimus*;

(*p*) Puff. L. of N. b. 8, c. 9, s. 6.

(*q*) Com. Dig. Prerogative, C. 1, 2, 3; Bac. Ab. Prerog. D. 4; 1 Chit. Commercial Law, 392, 414.

(*r*) Puff. b. 8, c. 6, s. 8, and Barbey, in loc.

(*s*) By 2 Hen. 5, st. 1, c. 6, such conduct was made to amount to the crime of *treason*. But this species of treason was afterwards abolished by 20 Hen. 6, c. 11.

[*cateri, latrones aut prædones sunt*” (*t*). Indeed, the reason given by Grotius, why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right,) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community (*u*); whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. Accordingly, with us in England, in order to make a war completely effectual, it is necessary that it be publicly declared and duly proclaimed by the sovereign’s authority; and then all parts of both the contending nations, from the highest to the lowest, are bound by it. And in whatever body the right resides of beginning a national war, in that body also must reside the right of ending it, or the power of making peace. But the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

4. As delay in declaring war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative, by authorizing the issue by the crown of letters of *marque and reprisal*, upon due demand; the prerogative of granting which, is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters

(*t*) Ff. 50, 16, 118.

(*u*) De Jure B. et P. l. 3, c. 3,
s. 11.

[are justifiable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another; justice being denied by that state to which the oppressor belongs (*x*). In such a case letters of marque and reprisal,—words used as synonymous, and signifying, the latter, a taking in return, the former, the passing the frontiers in order to such taking (*y*),—may be obtained, in order to seize (wherever they may be found) the bodies or goods of the subjects of the offending state, until satisfaction be made. And indeed this custom of reprisal seems dictated by nature herself; for which reasons we find in the most antient times very notable instances of it (*z*). But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle, it is with us declared by the statute 4 Henry V. c. 7, that if any subjects of the realm are oppressed by any foreigners in the time of truce, the king will grant marque in due form, to all that feel themselves grieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy seal, and he shall make out letters of request under the privy-seal; and if, after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of these, he may attack and seize the property of the ag-

(*x*) De Jure B. et P. l. 3, c. 2, ss. 4, 5.

(*y*) Dufresne, tit. Marea.

(*z*) See, for example, the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a multitude of cattle, as a satisfaction for

a prize won at the Elia games by his father Nelens, and for debts due to many private subjects of the Pylian kingdom; out of which booty the king took three hundred head of cattle for his own demand, and the rest were equitably divided among the other creditors.

[gressor nation, without hazard of being condemned as a robber or pirate.] But this manner of granting letters of marque has been long disused, and the term itself is now somewhat differently applied. For as during war, if a subject should take an enemy's ship without commission from the king, the prize would, by the effect of the prerogative, become an admiralty *droit*, and would belong not to the captor, but the crown,—therefore, in order to encourage merchants and others to fit out privateers, or armed ships, the lords of the admiralty have been empowered by various acts of parliament, and sometimes by proclamation of the king in council, to grant commissions, in time of war, to the owners of such ships, and to direct that the prizes captured by them shall be divided between such owners, the captains, and the crews (*a*). These commissions, when granted, have been usually denominated “letters of marque;” and it is in that sense alone that the term occurs in our own times (*b*).

5. [Upon exactly the same reason stands the prerogative of granting safe-conducts; without which, by the law of nations, no member of one society has a right to intrude into another (*c*). And therefore Puffendorf very justly resolves (*d*), that it is left in the power of all states to take such measures about the admission of strangers as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. By our laws great tender-

(*a*) See Vin. Abr. Prerog. N. A. pl. 22; Nicholl v. Goodall, 10 Ves. 155.

(*b*) In the Crimean war with Russia no “letters of marque” were issued to privateers; but by order in council, dated 29th March, 1854, “general reprisals” were granted against the ships, vessels and goods of the

Emperor of all the Russias, to give the benefit of the prizes taken by her Majesty's ships to the captors. (See 17 & 18 Vict. c. 18.)

(*c*) Com. Dig. Prerogative, B. 5; 1 Chitty's Commercial Law, 60, 487.

(*d*) Law of N. and N. bk. 3, c. 3, s. 9.

[ness is shown not only to foreigners in distress (as will appear when we come to speak of shipwrecks), but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, they enjoy the right of residence here with other large privileges, which have already been sufficiently explained (*e*). But no subject of a nation at war with us can come into the realm, nor travel himself upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers antient statutes must be granted under the great seal and inrolled in chancery, or else are of no effect (*f*): the crown being supposed the best judge of such emergencies, as may deserve exemption from the general law of arms. But passports under the sovereign's sign-manual, or licences from his ambassadors abroad, are now more usually obtained than letters of safe-conduct, and are allowed to be of equal validity (*g*).

The law of England,—a commercial country,—pays (it may be remarked) a very particular regard to foreign merchants. Thus, for example, by Magna Charta, (cap. 30,) if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook, that it was a maxim among the Goths and Swedes, “*quam legem exteri nobis posuerunt, eandem illis ponemus*” (*h*). But it is somewhat extraordinary that it should have found a place in Magna

(*e*) Vide snp. p. 408 et seq.

of safe-conducts or passports, vide post, bk. VI. c. VIII.

(*f*) See 15 Hen. 6, c. 3; 18 Hen. 6, c. 8; 20 Hen. 6, c. 1.

(*h*) De Jure Sueon. l. 3, c. 4.

(*g*) As to the offence of violation

[*Charta*, a mere interior treaty between the king and his natural-born subjects: which occasions the learned Montesquieu to remark with a degree of admiration, “that the English have made the protection of *foreign* merchants one of the articles of their national liberty” (*i*). But indeed it well justifies another observation which he has made, “that the English know better than any other people upon earth how to value at the same time these three great advantages, religion, liberty, and commerce” (*k*).]

The prerogatives of the sovereign hitherto considered relate to this nation’s intercourse with foreign nations; in all of which he is considered as the delegate or representative of his people. But in domestic affairs he is considered in a great variety of other characters, which will now lead us to the enumeration of many additional prerogatives.

6. [The sovereign is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament as he judges improper to be passed. The expediency of which constitution has before been evinced at large (*l*).] We shall only remark here, that the king is not in general bound by act of parliament, unless named therein by special and particular words (*m*). The most comprehensive words that can be devised (as “any person or persons, bodies

(*i*) Sp. L. 20, 13.

(*k*) Sp. L. 20, 7. Blackstone takes occasion here (vol. i. p. 261), to contrast the “genius of the Roman people, who in their manners, their constitution, and even in their laws, treated commerce as a dishonourable employment,” and cites C. 4, 63, 3. He adds, that the *canonists* went so far in the same direction “as to declare trade in-

“consistent with Christianity,” extending this denunciation also to “the profession of the law.” This (he says), was so determined at the council of Melfi, under Pope Urban the Second, A.D. 1090, and he cites Decret. 1, 88, 11; Act. Concil. apud Baron. c. 16.

(*l*) Vide sup. p. 326 et seq.

(*m*) Bac. Ab. Prerogative, E. 5.

politic or corporate,” and the like,) affect him not so as to restrain or diminish in the least any of his rights or interests (*n*). [For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject. Yet, where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the sovereign as upon the subject (*o*): and, likewise, the sovereign may take the benefit of any Act, though he be not specially named therein (*p*).

7. The sovereign is considered, in the next place, as the first in military command within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose; it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

In his capacity, therefore, of general of the kingdom, the sovereign has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated we shall speak more, when we come to consider the royal forces. We are now only to consider the prerogative of enlisting and of governing them: which indeed was disputed and claimed, contrary to all reason and precedent, by the Long Parliament of King Charles the first: but, upon the restoration of his

(*n*) Magdalen College case, 11 Rep. 74.

(*o*) Ib. 71.

(*p*) 7 Rep. 32.

[son, was solemnly declared by the statute 13 Car. II. c. 6, to be in the king alone: for that the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts, and other places of strength within the realm: the sole prerogative as well of erecting, as manning and governing, of which belongs to the sovereign in his capacity of general of the kingdom(*q*); and all lands were frequently subject to a tax, for building of castles wherever he thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the "*trinoda necessitas: sc. pontis reparatio, arcis constructio, et expeditio contra hostem*"(*r*). And this they were called upon to do so often, that, as Sir Edward Coke from Matthew Paris assures us(*s*), there were, in the time of Henry the second, 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, were severely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of King Stephen, "*erant in Angliâ quodammodo tot reges vel potius tyranni, quot domini castellorum*:" but it was felt by none more sensibly than

(*q*) 2 Inst. 30; Com. Dig. Prerogative, C. 4. Notice may be taken here of 23 & 24 Vict. c. 109, an Act for defraying the expenses of constructing fortifications for the protection of arsenals and dockyards, and of erecting a central arsenal. See also 23 & 24 Vict.

c. 112, for making better provision for acquiring land for the defence of the realm.

(*r*) Cowel's Interpr. tit. Castellorum Operatio; Seld. Jan. Ang. 1, 42.

(*s*) 2 Inst. 31.

[by two succeeding princes, King John and King Henry the third. And, therefore, the greatest part of them being demolished in the barons' wars, the kings of after times were very cautious of suffering them to be rebuilt in a fortified manner: and Sir Edward Coke lays it down (*t*), that no subject can build a castle, or house of strength embattled, or other fortress defensible, without the licence of the king; for the danger which might ensue, if every man at his pleasure might do it.

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the sovereign has the prerogative of appointing *ports* and *havens*, that is, such places as he in his wisdom sees proper, for persons and merchandize to pass into and out of the realm (*u*). By the feudal law all navigable rivers and havens were computed among the *regalia*, and were subject to the sovereign of the state (*x*). And in England it hath always been holden, that the sovereign is lord of the whole shore (*y*), and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm (*z*): and therefore, so early as the reign of

(*t*) 1 Inst. 5.

(*u*) See Hale de Portibus Maris.

(*x*) 2 Feud. t. 26; Crag. 1, 15, 15.

(*y*) F. N. B. 113; vide sup. vol. I. p. 452.

(*z*) Dav. 9, 56. Among these mention must be made of the *cinque ports*, viz. Hastings, Romney, Hythe, Dover, and Sandwich. On these ports extensive privileges were conferred by our early sovereigns, particularly by William the Conqueror and King John; and two other towns, Winchelsea and Rye, were subsequently added to their number. From their position, lying more immediately exposed to attacks from the French coast, they were supposed to be among the most im-relation to civil suits and proceed-

were placed under the especial custody of a *lord warden*; and, before the Reform Act, 1832, they sent (including certain boroughs attached to them) no less than sixteen members to parliament. These, however, by the effect of that Act, were reduced to eight. The cinque ports still possess a peculiar maritime jurisdiction; as to which see 51 Geo. 3, c. 36; 1 & 2 Geo. 4, c. 76, ss. 1—5, 15, 16, 18; 5 & 6 Will. 4, c. 76; 6 & 7 Will. 4, c. 105, ss. 10 and 11; 17 & 18 Vict. c. 120, ss. 8, 11, in sched.; 18 & 19 Vict. c. 48, s. 10; and 32 & 33 Vict. c. 53. Until recently, the lord warden of the cinque ports and the constable of Dover castle had, also, a local jurisdiction in relation to civil suits and proceed-

[King John, we find ships seized by the king's officers for putting in at a place that was not a legal port (*a*). These legal ports were undoubtedly at first assigned to the crown; since to each of them a court of portmote was incident, the jurisdiction of which must flow from the royal authority (*b*). The *great ports* of the sea are also referred to, as well known and established, by statute 4 Hen. IV. c. 20, which prohibits the landing elsewhere under pain of confiscation; and the statute 1 Eliz. c. 11, recites, that the franchise of landing and discharging had been frequently granted by the crown.]

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandize in any part of the haven; whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners.] This abuse occasioned statutes (*c*) to be passed enabling the crown to ascertain the limits of all ports, and to assign proper quays therein for the exclusive landing and loading of merchandize; and this duty, as well as those of appointing ports and sub-ports, and declaring the limits thereof, is now confided, by 16 & 17 Vict. c. 107, s. 9, to the commissioners of her majesty's treasury (*d*). There are also, with regard to ports or harbours, several other Acts of importance (*e*). By 19

ings:—but this was taken away by 18 & 19 Vict. c. 48 (amended by 20 & 21 Vict. c. 1, and 32 & 33 Vict. c. 53). See also 27 & 28 Vict. c. 80, as to *petty sessions* within the cinque ports.

(*a*) Madox, Hist. Exch. 530. As to the legal nature of "ports," see *Foreman v. Whitstable*, Law Rep., 4 Eng. & Ir. App. 266.

(*b*) 4 Inst. 148.

(*c*) Sec 1 Eliz. c. 11; and 13 & 14

Car. 2, c. 11; both of which Acts were repealed by 6 Geo. 4. c. 105.

(*d*) By 16 & 17 Vict. c. 107, s. 10, the commissioners may appoint "warehousing ports," and by s. 13, "sufferance wharves," for the purpose of the customs.

(*e*) In addition to the more general enactments referred to in the text, there are also the following Acts on this subject in regard to particular harbours;—13 & 14 Vict.

Geo. II. c. 22, certain nuisances in harbours are restrained. By 46 Geo. III. c. 153, (amended by 25 & 26 Vict. c. 69, s. 15,) no pier, quay, wharf, jetty, breast or embankment shall be erected in or near to any public harbour in the United Kingdom or any river communicating therewith, so far as the tide flows up the same, without giving one month's notice to the Board of Trade, —with a saving however of the privileges of the city of London. By 54 Geo. III. c. 159, the Admiralty is entrusted with the duty of regulating the mooring of vessels in all ports and harbours (*f*). By 10 & 11 Vict. c. 27, the provisions ordinarily inserted in local Acts passed for the construction and improvement of particular harbours, docks and piers—are consolidated into a single statute, so as to be embodied, by way of reference, in any special Act without needless repetition. And with the object of obviating the necessity, in certain cases, of obtaining, at great expense, a special local Act for such construction, the Board of Trade is now enabled by 24 & 25 Vict. c. 45 (*g*), to make provisional orders authorizing the construction of any pier, harbour, quay, wharf, jetty or excavation, by private undertakers upon application made to the Board (*h*). But such orders are of no

c. 116; 20 & 21 Vict. c. 32, 28 & 29 Vict. c. 100, as to the harbour of refuge in the *Isle of Portland*; 10 & 11 Vict. c. 76, and 17 & 18 Vict. c. 44, (amended by 25 & 26 Vict. c. 69, s. 17,) as to the *Holyhead harbours*; 26 & 27 Vict. c. 86, 27 & 28 Vict. c. 62, and 35 & 36 Vict. c. 23, as to the harbours of the *Isle of Man*; 23 & 24 Vict. c. 109 and c. 112, 25 & 26 Vict. c. 78, 27 & 28 Vict. c. 109, 28 & 29 Vict. c. 61, and 30 & 31 Vict. cc. 24, 145, as to the ports of *Dover* and *Portland*; 26 & 27 Vict. c. 71, (amended and continued by 27 & 28 Vict. c. 102, and 28 & 29 Vict. c. 120,) as to the harbour of *Har-*

wich; and 26 & 27 Vict. c. 72, as to the harbour of *Honfth*.

(*f*) By 54 Geo. 3, c. 159, ss. 14, 16, the duty of regulating the manner in which *ballast* or *shingle* may be taken from the shores or banks of ports and harbours, was also entrusted to the Admiralty. By 25 & 26 Vict. c. 69, s. 6, this jurisdiction was transferred to the Board of Trade.

(*g*) Vide sup. p. 462. This Act is amended by 25 Vict. c. 19, and 25 & 26 Vict. c. 69, ss. 11—14.

(*h*) Such orders may empower the undertakers to levy rates and borrow money for such works; and funds

validity or force until the confirmation thereof by act of parliament (*i*).

[The erection of beacons, lighthouses, and sea-marks is also incident to this branch of the royal prerogative; whereof the first were antiently used in order to alarm the country in case of the approach of an enemy; and all of them are signally useful in guarding and preserving vessels at sea by night as well as by day. For this purpose the sovereign hath power, by commission under his Great Seal (*k*), to cause them to be erected in fit and convenient places (*l*), as well upon the lands of the subject, as upon the demesnes of the Crown (*m*).] A power, however, of the same general nature is now, by statute, also vested in certain bodies subordinate to the Crown; viz. in the Trinity-house, for England and Wales and the Channel Islands; and in other authorities, for Scotland, the Isle of Man, and Ireland, respectively (*n*). And as the regulation of beacons, lighthouses, and sea-marks chiefly falls under their jurisdiction, the subject shall be postponed until we arrive at a division of the work in which some notice is taken of the Trinity-house and Lighthouse authorities, who will be found to be placed under the general superintendence of the Board of Trade (*o*).

To this branch of the prerogative may also be referred the power vested in her majesty by statute 16 & 17 Viet. c. 107, to prohibit, by proclamation or order in council, the *importation* of arms, ammunition, gunpowder, or other goods (*p*); or the *exportation* (and the carriage *coastwise*) of the articles above specified, or of military and naval

in aid of the works may also be advanced out of the consolidated fund, and by the public works loan commissioners, as to which see 24 & 25 Viet. c. 47, 80; 25 & 26 Viet. c. 30; c. 69, ss. 20—22; 26 & 27 Viet. c. 81; 29 Viet. c. 30; 32 & 33 Viet. c. 76.

(*i*) The 30 & 31 Viet. c. 33, is an

example of such a confirmatory Act.

(*k*) 3 Inst. 204; 4 Inst. 148.

(*l*) Rot. Claus. 1 Rich. 2, m. 42; Prynn on 4 Inst. 136.

(*m*) Sid. 158; 4 Inst. 149.

(*n*) 17 & 18 Viet. c. 104, s. 389.

(*o*) Vide post, bk. IV. pt. III. c. VIII.

(*p*) 16 & 17 Viet. c. 107, s. 45.

stores, or of any provisions capable of being used as food by man (*q*). [To the same head belongs the right which the sovereign has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. It is true that, by the common law, every man, as the general rule, may go out of the realm for whatsoever cause he pleaseth, without obtaining the sovereign's leave (*r*), which liberty was expressly declared in King John's great charter, though left out in that of Henry the third; but yet, inasmuch as every man ought of right to defend the sovereign and his realm, the sovereign at his pleasure may command him by his writ, that he go not beyond the seas or out of the realm without licence; and if he do the contrary, he shall be punished for disobeying the sovereign's command. And some persons there antiently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without licence obtained: among which were reckoned all peers, on account of their being councillors of the crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment, in the times of popery, to the see of Rome; and all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures (*s*). This was said in the time of Britton, who wrote in the reign of Edward the first; and Sir Edward Coke gives us many instances to this effect, in the time of Edward the third (*t*). In the succeeding reign the affairs of travelling wore a very different aspect; an act of parliament being made (*u*) forbidding all persons whatever to go abroad without licence, *except* only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers (*u*): but

(*q*) 16 & 17 Vict. c. 107, s. 150.(*t*) 3 Inst. 179.(*r*) F. N. B. 85.(*u*) 5 Rich. 2, c. 2.(*s*) Britton, c. 123.

[this Act was repealed by the statute 4 Jac. I. c. 1. At present every body has, or at least assumes, the liberty of going abroad when he pleases, and without licence. Yet undoubtedly if the sovereign, by writ of *ne exeat regno* (*x*), under his great seal or privy seal, were to think proper to prohibit a man from so doing, or to send a writ to any man, when abroad, commanding his return, and in either case the subject were to disobey (*y*)—it would be a high contempt of the royal prerogative; and it is said that in such case the offender's lands shall be seized till he return, and that then he is liable to fine and imprisonment (*z*).

8. Another capacity in which the sovereign is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom (*a*). By the fountain of justice the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the sovereign, as from his *free-gift*; but he is the steward of the public, to dispense it to whom it is *due* (*b*). He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual.] The original power of judicature, by the fundamental principles of society, is lodged in the society at large; but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore that power has been usually committed to certain select magistrates to hear

(*x*) The writ *ne exeat regno* is not now used for state purposes, but has become a mere process in a suit; and is used to prevent one of the parties from withdrawing his person or property from the jurisdiction of the court, by going abroad, unless he shall first give security for the satisfaction of such claim as the other party shall establish. (See Lord Bacon's Ordinances, No. 89; Ex parte Bruncker, 3 P.

Wms. 312; Dick v. Swinton, 1 Ves. & B. 373; Goodman v. Sayers, 5 Mad. 471.)

(*y*) As to the antient learning on this subject, see 3 Inst. 84, Against Fugitives.

(*z*) 1 Hawk. P. C. 22.

(*a*) Bac. Ab. Prerog. D.; Com. Dig. Prerog. D. 28.

(*b*) *Ad hoc autem creatus est rex, ut justitiam faciat universis.* — Bract. l. 3, tr. 1, c. 9, s. 3.

and determine complaints; and in England these magistrates are considered as in some sense the substitutes of the crown, in the exercise of the authority so vested in them. For the sovereign is himself, according to the prerogative now under consideration, the fountain of that justice which they administer, though it would be impossible, as well as improper, that he should personally carry into execution this great and extensive trust. And hence it is, that all jurisdiction of courts are either mediately or immediately derived from the crown; that the magistrates or judges who preside there are appointed also by the crown, and that the proceedings run generally in the sovereign's name, pass under his seal, and are executed by his officers. [Indeed, it is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our sovereigns in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our sovereigns have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter nor any other authority than an act of parliament (*c*).

In criminal proceedings, or prosecutions for offences, it would, indeed, be very absurd if the sovereign personally sat in judgment; because, in regard to these he appears in another capacity, that of *prosecutor*. For all offences are considered as either against the king's peace, or his crown and dignity; and it was formerly necessary in every indictment so to describe them (*d*). For though in their consequences they generally seem (except in the case of treason, and a very few others), to be rather offences

(*c*) 2 Hawk. P. C. 1.

insufficient for want of the words,

(*d*) By 14 & 15 Vict. c. 100, s. 21,

"against the peace."

no indictment is now to be held

[against the kingdom than the sovereign,—yet as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against that magistrate; who is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution (wherein the sovereign was bound by his coronation oath to conserve the peace), that in case of any forcible injury offered to the person of a fellow-subject, the offender was accused of a kind of perjury, in having violated the sovereign's coronation oath, *dicebatur fregisse juramentum regis juratum* (*f*). And hence also arises another branch of the prerogative, that of *pardoning* offences; for it is reasonable that he only who is injured should have the power of forgiving. Of prosecutions and pardons more will be said hereafter. They are mentioned here in this cursory manner, only to show the constitutional grounds of this power of the crown, and how regularly connected all the links are, in this vast chain of prerogative.

A consequence of the particular prerogative now under consideration is the legal *ubiquity* of the sovereign. In the eye of the law he is always present in all his courts, though he cannot personally distribute justice (*g*). His judges are the mirror by which his image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions or pronounce judgment, for the benefit and protection of the subject.] And this ubiquity is illustrated by certain technical distinctions applicable to proceedings to which

(*f*) Stiern. de Jure Goth. l. 3, c. 3. A notion somewhat similar to this may be found in the *Mirroure*, c. 1, s. 5. And so also when the Chief Justice Thorpe was condemned

to be hanged for bribery, he was said "*sacramentum domini regis fregisse*."—Rot. Parl. 25 Edw. 3.

(*g*) Fortese, c. 8; 2 Inst. 186.

the crown is party. Thus the sovereign can never be *non-suited* (*h*), for that supposes the non-appearance of the plaintiff in court, though the attorney-general may enter a *non vult prosequi*, which has much the same effect. [For the same reason also, in the forms of legal proceedings, the king is never said to appear by attorney, as other men may do; for, in contemplation of the law, he is always present in court (*i*).

From the same original, of the sovereign's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in him alone (*k*). These proclamations have then a binding force, when—(as Sir Edward Coke observes)—they are grounded upon and enforce the laws of the realm (*l*). For though the making of laws is entirely the work of a distinct part, the legislative branch, of the supreme power, yet the manner, time, and circumstances of putting those laws in execution, must frequently be left to the discretion of the executive magistrate. And therefore royal constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where, neither contradicting the old laws or tending to establish new ones, they only enforce the execution of such laws as are already in being, in such manner as the sovereign shall judge necessary. For example, the established law is, that the sovereign may prohibit any of his subjects from leaving the realm: a proclamation therefore forbidding this in general, for three weeks, by laying an embargo upon all shipping in time of war, has been held equally binding as an act of parliament, because founded upon a prior law (*m*).] But a proclamation laying an embargo, in time of peace, upon

(*h*) Co. Litt. 139.

(*i*) Finch, 1, 81.

(*k*) Such proclamations may be *primâ facie* proved by producing the Government Gazette announcing the same, or by a copy printed by

any government printer, or by a certified extract from the Privy Council minutes. (See 31 & 32 Vict. c. 37.)

(*l*) 3 Inst. 162.

(*m*) 4 Mod. 177, 179.

all vessels laden with wheat, being contrary to law, and particularly to the statute 22 Car. II. c. 13,—the advisers of such a measure (though it was in a time of public scarcity), and all persons acting under the proclamation, found it necessary to be indemnified by a special act of parliament, viz. 7 Geo. III. c. 7. [It is true, that by the statute 31 Hen. VIII. c. 8, it was once enacted, that the king's proclamations should have the force of acts of parliament; a statute which was calculated to introduce the most despotic tyranny, and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after (*n*).]

9. The sovereign is also, as *parens patriæ*, invested with a kind of guardianship over various classes of persons who from their legal disability stand in need of protection (*o*). This branch of the prerogative in regard to *infants* has been already noticed (*p*). But it also extends to the case of *idiots* and *lunatics*.

[An *idiot* (or natural fool) is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any: but none is to be held such who hath any glimmering of reason (*q*), so that he can tell his parents, his age, or the like common matters (*r*). The custody of an idiot and of his lands

(*n*) Stat. 1 Edw. 6, c. 12.

(*o*) 3 Bl. Com. 427. See *De Manneville v. De Manneville*, 10 Ves. jun. 52.

(*p*) Vide sup. p. 311.

(*q*) F. N. B. 233; 3 Bligh, N. S. 1.

(*r*) Blackstone adds here (vol. i. p. 304), that “a man who is born “deaf, dumb, and blind, is looked “upon by the law as in the same “state with an idiot, he being supposed incapable of any understanding, as wanting all those

“senses which furnish the human “mind with ideas.” And he cites Co. Litt. 42 (b); Fleta, l. 6, c. 40. But these authorities do not bear him out in his statement; as they go merely to the point that such a person is incapable of aliening his lands. At all events, if the ancient law *did* take the view which Blackstone supposes of the intellectual condition of such a person, it is a doctrine which in modern times is clearly untenable.

[was formerly vested in the lord of the fee (*s*); but by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king as the general conservator of his people, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress (*t*). This prerogative is declared in parliament by the statute *De Prærogativâ Regis* (*u*), which directs, in affirmance of the common law (*x*), that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and finding them necessities; and that after the death of such idiots he shall render the estate to the heirs;—in order to prevent such idiots from aliening their lands, and their heirs from being disinherited (*y*).]

In the old common law there is a writ *de idiotâ inquirendo*, to inquire whether a man be an idiot or not (*z*): which was tried by a jury of twelve men: and if they found him *purus idiota*, the profits of his lands and the custody of his person might be granted by the sovereign to any subject who had interest enough to obtain them (*a*). [Such a result must of course have been always considered as a hardship upon private families; and in the eighth year of James the first, it was under the consideration of parliament to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then intended to share the same fate with the slavery of the feudal tenures, which has been since

(*s*) Fleta, lib. 1, c. 11, s. 10.

(*t*) F. N. B. 232.

(*u*) 17 Ed. 2, st. 1, c. 9.

(*x*) 4 Rep. 126; Memorand. Scacc. 20 Edw. 1 (prefixed to Maynard's Year Book of Edward 2), fol. 20b 24; vide 2 Inst. 14.

(*y*) This statute seems not to extend to the *copyhold* lands of idiots or lunatics, Bac. Ab. Idiots, &c. (C.); but the crown's prerogative

extends to their persons, goods and chattels, as well as freehold lands (Beverley's case, 4 Rep. 126 a; F. N. B. ubi sup.).

(*z*) F. N. B. ubi sup.

(*a*) This power, though in modern times never exerted, long continued to be alluded to in common speech, by the usual expression of *begging* a man for a fool.

[abolished (*b*). But no grievance of this kind ever now occurs. For that part of the prerogative which relates to idiots has long been, in effect, dormant;—being merged, as it were, in the part of it which relates to lunatics, to the consideration of which we will now proceed (*c*).

A *lunatic* is a person who hath had understanding, but by disease, grief, or any other cause, hath lost the use of his reason (*d*), or has become *non compos*, that is, of mind so unsound as to be incapable of conducting himself or his affairs.] And this last term (according to Sir E. Coke) is the most legal; the term lunatic being in its derivation applicable only to one that has lucid intervals, depending, as some formerly imagined, upon the change of the moon (*e*), though now used technically, as well as popularly, in the more extended sense of a person affected by any species of insanity supervening since his birth. [To all lunatics, as well as to idiots, the sovereign is guardian, but to a very different purpose: for the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or, after their decease, to their representatives: and hence it is declared by the statute *De Prærogativâ Regis* (*f*) before mentioned, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use when they come to their right mind. And that the king shall take nothing to his own use; and if the parties die in such a

(*b*) 4 Inst. 203; Com. Journ. 1610.

(*c*) Accordingly, in 16 & 17 Vict. c. 70, s. 2, it is enacted, that in that statute the word "lunatic" shall be "construed to mean any person found by inquisition *idiot, lunatic*, or of unsound mind, and incapable of managing himself and

"his affairs."

(*d*) "*Idiota a casu et infirmitate*."—Mem. Scacc. 20 Edw. 1 (in Maynard's Year Book of Edward 2), 20; and see *Ridgway v. Darwin*, 8 Ves. 65; *Re J. B.*, 1 Myl. & Cr. 538.

(*e*) See 1 Bl. Com. p. 304.

(*f*) 17 Ed. 2, st. 1, c. 10.

[state, the residue shall be distributed for their souls by the advice of the ordinary, and of course, (by the subsequent amendments of the law of administration,) shall now go to their executors or administrators (*g*). On the first attack of lunacy, while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody, under the direction of their nearest friends and relations (*h*).] But it often becomes desirable and even necessary for the more effectual protection of the lunatic's person, and the regulation and administration of his property and affairs, to apply for the exercise of the royal prerogative in relation to this subject.

The course taken for this purpose is as follows. The lord chancellor,—to whom, by special authority from the sovereign, the custody of both idiots and lunatics is intrusted (*i*),—upon petition or information, grants a commission in the nature of the antient writ *de lunatico inquirendo*, (which is analogous to that *de idiotâ inquirendo*, before mentioned,) to inquire into the party's state of mind. The proceedings on such commission are regulated by the 16 & 17 Vict. c. 70 (*k*), amended by 25 & 26 Vict. c. 86 (*l*). Under these Acts, the commission itself

(*g*) Vide sup. p. 193 et seq.

(*h*) As to the regulation of lunatic asylums, vide post, bk. iv. pt. III. c. v.

(*i*) 3 P. Wms. 107; 2 Atk. 553; 3 Atk. 635. The king himself used formerly to commit the custody of insane persons to proper committees in every particular case; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king, under his royal sign manual, to the chancellor or keeper of his seal to perform this office for him; and if he acts improperly in granting such custodies, the complaint must be made to the king

himself in council. (3 Bl. Com. 427.)

(*k*) By this statute many previous ones on the same subject,—viz., 6 Geo. 4, c. 53; 1 Will. 4, c. 65; 3 & 4 Will. 4, cc. 36, 84; 5 & 6 Vict. c. 84; 15 & 16 Vict. c. 48—are either wholly or in part repealed. As to matters in lunacy, see also the General Orders made 7th Nov. 1853, 12th Jan. 1855, 8th Nov. 1856, 10th Feb. 1866, and 10th Jan. 1870. And it may be as well, also, to mention here the statute 14 & 15 Vict. c. 81, as to inquisitions of lunacy taken in *India*.

(*l*) The 16 & 17 Vict. c. 70, is

is directed to certain judicial officers called Masters in Lunacy (*m*); but the inquiry into the state of mind of the party, as authorized by such commission, usually takes place before a *jury* (*n*)—on an issue directed by the lord chancellor, to be determined in that manner (*o*). The verdict on such inquisition must be upon the oath of twelve men at the least (*p*); and after the due examination (unless in special cases) of the alleged lunatic, both before the taking of the evidence, and also at the close of the proceedings, before they consult as to their verdict (*q*). And such examination may be either in open court or in private, as the judge trying the issue shall direct (*r*). If by the verdict the party be found *non compos*, the care of his *person*, with a suitable allowance for his maintenance (*s*) in some private or public asylum (where

also amended by 18 & 19 Vict. c. 13, in reference to the authority therein given to the Lord Chancellor to sanction leases of the estates of a lunatic.

(*m*) 16 & 17 Vict. c. 70, s. 38. The commission may be either a special one applicable to some particular case, or a general commission issued to the "Masters in Lunacy," directing their inquiry into such cases, generally, as shall be referred to them. (Sect. 39.)

(*n*) On the other hand, where the alleged lunatic does not demand an inquiry before a jury,—or where the lord chancellor is satisfied by personal examination that he is incompetent to form and express a wish in that behalf, and deems it inexpedient that the inquiry should be before a jury,—the masters in lunacy may, without either jury or special commission, inquire into the party's state of mind, and certify their finding thereon. (Sect. 42.) As to the

effect of such certificate on the management of the lunatic's property in certain cases, see 25 & 26 Vict. c. 86, s. 12.

(*o*) Sect. 4. Unless the judge trying such issue shall otherwise direct, no evidence as to anything said or done, (or as to the demeanour or state of mind of the person who is the subject of the inquiry,) at any time more than *two years* before the inquiry, shall be receivable in proof of insanity. And the rule is the same, where the inquiry takes place before a master without a jury. (Sect. 3.)

(*p*) As to such jury and as to the trial of the issue, see 8 & 9 Vict. c. 100; 16 & 17 Vict. c. 70, s. 46; 25 & 26 Vict. c. 86, s. 4. As to a new trial, or a fresh inquiry, see sect. 7 of the Act last cited.

(*q*) 25 & 26 Vict. c. 86, s. 6.

(*r*) Ibid.

(*s*) See In re French, Law Rep., 3 Ch. App. 317.

an asylum is requisite), is usually committed to some friend, who is then called his *committee* (*t*). [In order to prevent sinister practices, the next heir is seldom permitted to be this committee, because it is his interest that the party should die. But it hath been said that there lies not the same objection against his next of kin, provided he be not also heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings which he or his family may hereafter be entitled to enjoy (*u*). And the heir is generally made the manager or committee of the *estate*, it being clearly his interest by good management to keep it in condition; but he is accountable to the court of chancery, and to the *non compos* himself, if he recovers; or otherwise to his administrators (*x*).] Moreover by the Lunacy Acts above mentioned of the present reign, it is provided, that every person found by inquisition to be lunatic shall be personally visited, seen, and reported upon, by official *visitors*, four times at the least in every year, and at such other times as the lord chancellor may direct (*y*).

Our statute law contains, also, a variety of other pro-

(*t*) See 16 & 17 Vict. c. 70, s. 63. It may be remarked, that with regard to persons of unsound mind the civil law agrees with ours, in assigning them curators to manage their persons and estates: though, in one respect, the Roman law goes much beyond the English; for if a man by notorious prodigality was in danger of wasting his estate, he, too, was committed to the care of a curator. (Ff. 27, 10, 1.) But with us, when a man on an inquest of idiocy hath been returned an *unthrif*t, and not an idiot, no further proceedings have been had. (Bro. Abr. tit. Idiot, 4; 1 Bl. Com. p. 306.)

(*u*) 2 P. Wms. 638. It may be

remarked here, that in a recent case some portion of the lunatic's estate was directed to be applied towards the maintenance of some of the next of kin who were in needy circumstances. (In re Frost, Law Rep., 5 Ch. App. 699.)

(*x*) See 16 & 17 Vict. c. 70, ss. 62, 64. The committee is, by a variety of enactments, empowered in many cases to represent or act for the lunatic (vide sup. vol. I. p. 478). As to *charging* the lunatic's property for his benefit, see 25 & 26 Vict. c. 86, s. 16.

(*y*) 16 & 17 Vict. c. 70, ss. 2, 106, 107; 25 & 26 Vict. c. 86, ss. 19—22. See also 8 & 9 Vict. c. 100, s. 112.

visions for the protection and management of persons labouring under this deplorable calamity,—but they are not of a nature to be conveniently stated in this place, and shall be reserved therefore for a subsequent division of the work (z).

10. [The sovereign is likewise the fountain of honour, of office, and of privilege; and this in a different sense from that wherein he is styled the fountain of justice: for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; in order that the people may know and distinguish such as are set over them, so as to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions. And as the law supposes that no one can be so good a judge of their several merits and services, as the sovereign himself who employs them, it has, therefore, intrusted to him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. Hence all degrees of nobility, of knight-hood, and other titles, are received by immediate grant from the crown; either expressed in writing, by writs or letters patent, as in the creation of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.] And the law of England prohibits all subjects of the realm from receiving any title or decoration from any foreign prince without the consent of their own sovereign (a).

[From the same principle also arises the prerogative of erecting and disposing of offices; for honours and offices held under the crown, are in their nature convertible and synonymous. All such offices carry in the eye of the law an honour along with them; because they imply a superiority

(z) Vide post, bk. IV. pt. III. c. v.

(a) Jac. Dict. *in tit.* "Peers."

[of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honours, in their original, had duties or offices annexed to them: an earl, *comes*, was the conservator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the same reason therefore, that honours are in the disposal of the sovereign, public offices ought to be so likewise; and as he may create new titles, so may he create new offices. But with this restriction,—that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices (*b*); for this would be a tax upon the subject, which cannot be imposed but by act of parliament (*c*). Wherefore, in the thirteenth year of Henry the fourth, a new office being created by the king's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked by parliament and declared void.

Upon the same or the like reason, the sovereign has also the prerogative of conferring privileges upon private persons; such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom (*d*).] He cannot, however, on the creation of a peer, give him precedence before others of the same rank, the power of the crown being in that respect restrained by 31 Hen. VIII. c. 10, which settles the place and precedence of all the nobility and great officers of state (*e*). The sovereign may also erect *corporations*, whereby a number of private persons are united and knit together, and enjoy many liberties, powers and immunities in their politic, of which they were utterly incapable in their natural, capacity (*f*).

In connection with this branch of the prerogative it

(*b*) Com. Dig. Prærog. D. 3.

(*c*) 2 Inst. 533.

(*d*) 4 Inst. 361.

(*e*) See Hovenden's Blackstone, vol. i. p. 272, where the 4th art. of

the Act of Union with Ireland is also cited.

(*f*) 1 Bl. Com. p. 272. As to

corporations, vide sup. vol. i. p. 358; and post, bk. IV. pt. III. c. 1.

may also be mentioned, that by the civil list Act passed at the queen's accession, (1 & 2 Vict. c. 2,) her majesty is empowered to grant pensions to the amount of 1,200*l.* per annum, chargeable on her civil list revenues: which pensions are intended to make provision for the support of persons who have just claims on the royal beneficence; or who by their services or discoveries have merited the gratitude, while they need the aid, of their country.

11. [Another light in which the laws of England consider the sovereign, with regard to domestic concerns, is as the arbiter of commerce.

The royal prerogative, so far as it relates to this subject, will fall principally under the following articles:

First, the establishment of public *marts*, or places of buying and selling; such as markets and fairs, with the tolls thereunto belonging (*g*). These can only be set up by virtue of the royal grant, or by long and immemorial usage and prescription, which supposes such a grant to have been originally made (*h*). The limitations of these public resorts to such time and such place as may be most convenient for the neighbourhood, forms a part of economics, or domestic polity; which, considering the kingdom as a large family, and the sovereign as the master of it, he clearly has a right to dispose and order as he pleases.

Secondly, the regulation of *weights and measures*. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard; which standard it is impossible to fix by any written law or oral proclamation; for no man can, by

(*g*) Vide sup. vol. I. p. 663.

(*h*) 2 Inst. 220; vide sup. vol. I. pp. 685 et seq.

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[words only, give another an adequate idea of a foot-rule, or a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and the prerogative of fixing this standard, our antient law vested in the crown, as in Normandy it belonged to the duke (*i*). This standard was originally kept at Winchester; and we find in the laws of King Edgar, near a century before the Conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm (*h*). Most nations have regulated the standard of measures of length, by comparison with the parts of the human body: as the palm, the hand, the span, the foot, the cubit, the ell, the pace and the fathom (*l*). But as these are of different dimensions in men of different proportions, our antient historians inform us, that a new standard of longitudinal measure was ascertained by King Henry the first; who commanded that the *ulna*, or antient ell, which answers to the modern yard, should be made of the exact length of his own arm (*m*). And, one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, that original standard. Thus, by the statute called *compositio ulnarum et perticarum*, five yards and a half make a perch; and the yard is subdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of barley. Superficial measures are derived by squaring those of length; and measures of capacity by cubing them. The standard of weights was originally

(*i*) Gr. Coustum. c. 16.

(*h*) Cap. 8.

(*l*) A cubit (*cubitus*) is the distance from the elbow to the extremity of the middle finger, i. e., the fourth part of a well-proportioned man. A fathom (derived from

a Saxon word) is the space to which a man can extend with both arms. (Johnson's Dict.)

(*m*) Will. Malmsb. in Vita Hen. I.; Spelm. Hen. I. apud Wilkins, 299.

[taken from corns of wheat, whence the lowest denomination of weights we have is still called a grain; thirty-two of which are directed, by the statute called *compositio mensurarum*, to compose a pennyweight, whereof twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first standards were made; which, being originally so fixed by the crown, their subsequent regulations have been generally made by the king in parliament. Thus, under king Richard the first, in his parliament holden at Westminster, A.D. 1197, it was ordained that there should be only one weight and one measure throughout the kingdom; and that the custody of the assize, or standard of weights and measures, should be committed to certain persons in every city and borough (*p*): from whence the antient office of the king's aulnager seems to have been derived; whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the statute 11 & 12 Will. III. c. 20. In King John's time, this ordinance of King Richard was frequently dispensed with for money; which occasioned a provision to be made for enforcing it, in the great charters of King John and his son (*q*). These original standards were called *pondera regis* (*r*), and *mensuræ domini regis* (*s*); and were directed by a variety of subsequent statutes to be kept in the exchequer, and all weights and measures to be made conformable thereto. But Sir Edward Coke observes, that though this had so often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude (*t*).] In our own times, however, new parliamentary enactments have been devised on this subject, and other weights and measures substituted for those which antiently obtained. For by

5 Geo. IV. c. 74, 6 Geo. IV. c. 12, 5 & 6 Will. IV.

(*p*) Hoved. Matth. Paris.

(*q*) 9 Hen. 3, c. 25.

(*r*) Plac. 35 Edw. 1, apud Cowel's

Interpr. tit. *Pondus regis*.

(*s*) Flet. 2, 12.

(*t*) 2 Inst. 41.

c. 63 (*u*), 18 & 19 Vict. c. 72, and 22 & 23 Vict. c. 56 (*x*), fresh standards are fixed for length, weight, and capacity (*y*); and it is provided that all contracts for sale by weight or measure, where no special agreement is made to the contrary, shall be taken to refer to the standards so established. It is also enacted by these statutes, that all articles sold by weight shall be sold by *avoirdupois* weight,—except gold, silver, platina, diamonds, or other precious stones, which may be sold by *troy* weight (*z*); and drugs, which, (when sold by retail,) may be sold by *apothecaries'* weight (*a*): and further, that it shall be penal for any person to sell by measure of capacity, other than one of the imperial measures or some multiple or aliquot part thereof (*b*). And in the year 1864, it was considered expedient, for the promotion and extension of our internal as well as our foreign trade and for the advancement of science, to legalize (without making compulsory) the use of the *metric* system of weights and measures; to which

(*u*) This Act repeals a prior statute on the same subject, viz. 4 & 5 Will. 4, c. 49. It also abolished the "Winchester" bushel, and "all local and customary measures."

(*x*) By 22 & 23 Vict. c. 66 (amended by 23 & 24 Vict. c. 146, and 24 & 25 Vict. c. 79), special regulations are made as to the measures to be used in the sale of *gas*.

(*y*) By 5 & 6 Will. 4, c. 63, s. 17 (see the *Queen v. Skelton*, 1 E. & E. 816), provisions are made for the appointment of *inspectors* of weights and measures by county justices—and analogous provisions are contained in 22 & 23 Vict. c. 56, s. 4, and 24 & 25 Vict. c. 75, s. 6, with regard to their appointment in municipal boroughs in aid of the *leet* juries and other antient authorities; and by 24 & 25 Vict. c. 78, for the

appointment of such inspectors (in the place of "annoyance jurors," which that Act abolishes) within the city and liberty of Westminster.

(*z*) See also 16 & 17 Vict. c. 29, as to sales of *bullion* by troy weight.

(*a*) See the following cases which have arisen on the construction of the Weights and Measures Acts: *Washington v. Young*, 5 Exch. 403; *Thomas v. Stephenson*, 2 Ell. & Bl. 108; *Queen v. Jarvis*, 3 Ell. & Bl. 640; *Rosseter v. Cahlmann*, 8 Exch. 361; *L. & N. W. Rail. Co. v. Richards*, 2 B. & Smith, 326; *Carr v. Stringer*, Law Rep., 3 Q. B. 433.

(*b*) This enactment does not extend to sales by *weight*, see *Hughes v. Humphreys*, 3 Ell. & Bl. 954; *Jones v. Giles*, 10 Exch. 119.

and it was enacted by 27 & 28 Vict. c. 117, that no contract for dealing shall be invalidated by the weights or measures therein expressed or referred to being of the metric system, or other decimal subdivisions of legal weights and measures (*c*). An alteration has also recently been made as to the custody of the standards of length, weight and measures of capacity; which, by the 29 & 30 Vict. c. 82, is now committed to the *Board of Trade*, and not (as formerly) to the Exchequer and the Treasury.

[Thirdly, as *money* is the medium of commerce, it is the sovereign's prerogative, as the arbiter of domestic commerce, to give it authority or make it current. Money is the representative or sign of value between buyer and seller, or debtor and creditor. And metals are well calculated for this sign, because they are durable and are capable of many subdivisions; and a precious metal is especially calculated for this purpose, because it is the scarcest and most portable.]

In all civilized countries, therefore, it is the metals which are used for money (*d*), and for this purpose they are first *coined*, or fabricated into certain pieces by public authority; it being also declared, by such authority, at what value in relation to other known pieces or quantities of metal they are to be taken. How far, as so coined and after its issue, a piece of metal always retains the same value in relation to commodities is a point that deserves consideration. [Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries; and the quan-

(*c*) The schedule to this Act contains tables of the values of the principal denominations of measures and weights on the metric system, expressed by means of the legalized denominations of measures and weights in the United Kingdom.

(*d*) The circulating medium in

this country consists, not only of coin, but of paper, that is, of notes of the Bank of England; but as these notes are convertible at the pleasure of the holder into cash, the circulating medium is in effect, though not in a literal sense, exclusively metallic.

[tity is daily increasing (*e*). The consequence is, that more money must be given now for any commodity, of which the quantity has not increased in the same proportion, than was given an hundred years ago. And if any accident were to diminish the quantity of gold and silver, their value would proportionably rise. A horse, that was formerly worth ten pounds, is now perhaps worth twenty; and by any failure of current specie, the price might be reduced to what it was. Yet is the horse, in reality, neither dearer nor cheaper at one time than another: for, if the metal which constitutes the coin was formerly twice as scarce as at present, the commodity was then as dear at half the price as now it is at the whole.] It must be confessed, however, that a rise of this kind in the price of commodities, tends to the injury of all those whose income expressed in money remains the same. For if a horse that could formerly have been purchased at ten pounds cannot now be purchased for less than twenty, in consequence only of such augmentation in the quantity of gold throughout the realm, as has reduced the value of the sovereign by one-half,—it follows that a person whose income in pounds sterling is only the same now as it was then, will find the purchase of the horse twice as expensive and difficult as he would have done at the earlier period.

The value of money when coined becomes known on inspection; and as, when not so authenticated, it cannot be easily ascertained, it is the rule of the common law that there can be no *legal tender* (or in other words, that no tender of payment of any debt is valid and sufficient), unless made in the common coin of the realm (*f*). This

(*e*) 1 Bl. Com. p. 276. The modern discovery of regions abounding with gold in California and Australia, makes this statement of Blackstone (made more than a century ago) particularly applicable to

the present times.

(*f*) Wade's case, 5 Rep. 114. By 33 & 34 Vict. c. 10, s. 11, her Majesty may direct the establishment of a branch of the Mint in any *British possession*, and determine

rule, however, is qualified by the statute law; for by 3 & 4 Will. IV. c. 98, s. 6, a tender may be made in Bank of England notes, payable to bearer on demand, for all sums above 5*l.*,—so long as the Bank continues to pay on demand in legal coin.

[With respect to coinage in general, there are three things to be considered; the materials, the impression, and the denomination.

With regard to the materials, Sir Edward Coke lays it down, that the money of England must either be of gold or silver (*g*); and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by King Charles the second, and ordered by proclamation to be current in all payments under the value of sixpence, and not otherwise.] And recently, instead of pure copper, coins composed of *bronze* or other mixed metal have been authorized to be issued as current coin of the realm. But this copper (or bronze) coin is not upon the same footing with the other in many respects, particularly with regard to the offence of coining, which, by 24 & 25 Vict. c. 99, is treated with somewhat more severity when it is committed in relation to gold or silver coin (*h*). Moreover, payment in silver is only a legal tender up to a certain amount; it being provided by 33 & 34 Vict. c. 10, s. 4, that gold coin shall be the only legal tender, except as regards sums not exceeding forty shillings, which may be tendered in the silver coin; or not exceeding one shilling, which may be tendered in bronze coins (*i*).

[As to the impression, the stamping of money is the unquestionable prerogative of the crown: for, though divers bishops and monasteries had formerly the privilege

the extent to which coins issued therefrom are to be current and a legal tender.

(*g*) 2 Inst. 577.

(*h*) Vide post, bk. VI. ch. VI.

(*i*) By this statute a previous Act in relation to the issue of bronze coins (*viz.*, 22 & 23 Vict. c. 30) is repealed.

[of coining money, yet, as Sir Matthew Hale observes (*k*), this was usually done by special grant from the king, or by prescription, which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Moreover they had only the profit of the coinage, and not the power of instituting either the impression or denomination: but had usually the stamp sent them from the exchequer.

The denomination, or the value for which the coin is to pass current, is likewise in the breast of the sovereign; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called *esterling* or *sterling* metal (*l*); a name for which there are various reasons given, but none of them entirely satisfactory (*m*). And of this sterling or esterling metal all the gold and silver coin of the kingdom must be made, by the statute 25 Edw. III. c. 13 (*n*). So

(*k*) 1 Hist. P. C. 191.

(*l*) See 33 & 34 Vict. c. 10, ss. 3, 16, 17. This standard of gold and silver has frequently varied, but is now thus settled in accordance with what was provided by 56 Geo. 3, c. 68. The pound troy of gold, consisting of twenty-two carats fine, and two of alloy, is divided into 46 $\frac{2}{3}$ sovereigns, or into 46*l.* 14*s.* 6*d.* And the pound troy of silver, consisting of eleven ounces and two pennyweights pure, and eighteen pennyweights alloy, is divided into sixty-six shillings. (See 33 & 34 Vict. c. 10, 1st sched.)

(*m*) See Spelm. Gloss. 203; and Dufresne, III. 165. The most plausible opinion seems to be that adopted by these two etymologists, viz. that

the name was derived from the *Es-terlingi*, or Easterlings; as those Saxons were antiently called, who inhabited that district of Germany, afterwards occupied by the Hanse Towns and their appendages; the earliest traders in modern Europe.

(*n*) The ascertaining whether coin is of the proper standard is called *pixing* it; and there are occasions on which resort is had, for this purpose, to an antient mode of inquisition called the *trial of the pyx*, before a jury of members of the Goldsmiths' Company. (See 33 & 34 Vict. c. 10, s. 17.) For information on this subject, see *Archæologia*, vol. xvi.; Ridding's *Annals of the Coinage*. The constitution of the Mint was remodelled in the

[that the royal prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value (*o*): though Sir Matthew Hale appears to be of another opinion (*p*). The sovereign may also, by his proclamation, legitimate foreign coin, and make it current here (*q*); declaring at what value it shall be taken in payment, by comparison with the standard of our own coin (*r*); and may, moreover, at any time decri (or cry down) any coin of the kingdom, and make it no longer current (*s*). But though the regulation of the coinage thus forms part of the prerogative of the crown, yet it is a subject over which parliament also exercises a control; and since the Revolution it is under the authority of parliament that the coinage has been in fact principally regulated (*t*).

12. The sovereign is, also, considered by the laws of England as the head and supreme governor of the established Church.

To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than of law. It will be sufficient therefore to observe that, by statute 26 Hen. VIII. c. 1,—reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the Church of England, and so had been recognized by the clergy of this kingdom in their convocation,—it is enacted, that the king shall be reputed the only supreme head, in earth, of the Church of England; and should

year 1815, and again in 1870, when the Chancellor of the Exchequer for the time being was made the *Master of the Mint*; the custody of the standard weights committed to the Board of Trade; and the general superintendence of the Mint entrusted to the Treasury. (33 & 34 Vict. c. 10, ss. 13, 14, 16, 17.)

(*o*) 2 Inst. 577.

(*p*) 1 Hale, P. C. 194.

(*q*) See 33 & 34 Vict. c. 10, s. 11.

(*r*) See 1 Hale, P. C. 197.

(*s*) Ibid.

(*t*) As to *offences* relating to the coin, vide post, bk. VI. ch. VI. We may mention here, the statutes of 7 & 8 Vict. c. 22; 17 & 18 Vict. c. 96; and 18 & 19 Vict. c. 60, as to the *standard of gold wares*, and the *assaying of gold and silver wares*.

[have, annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities and commodities to the said dignity of the supreme head of the Church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1.

In virtue of this authority the sovereign convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods, or convocations. This is an inherent and antient prerogative of the crown; as appears by the statute 8 Hen. VI. c. 1, and the many authors, both lawyers and historians, vouched by Sir Edward Coke (*u*). It is to be observed, that a convocation in England differs considerably in its constitution from the synods of other Christian kingdoms: these consisting wholly of bishops (*x*). Whereas with us, the convocations (of which there are two, one for the province of Canterbury, the other for that of York), are more in the nature of a parliament,—all the beneficed clergy having representatives therein, who share with the bishops and other dignitaries such rights as the convocations possess. This constitution is said to be owing to the policy of Edward the first; who at one and the same time let into these assemblies the inferior clergy and also introduced a method of taxing ecclesiastical benefices by consent of convocation (*y*).]

All deans and archdeacons are members of the convocation of their province; each chapter sends one proctor or representative; and the beneficed parochial clergy in each diocese in Canterbury, two proctors: but on account of the small number of dioceses in the province of York, the beneficed clergy in each archdeaconry of that province elect two proctors. There are two distinct houses of either convocation, of which the archbishop and bishops form the

(*u*) 4 Inst. 322, 323. It may be observed here, that in the Revised Statutes, recently published by authority, the 8 Hen. 6, c. 1, appears as one still in force; but the 26

Hen. 8, c. 1, was repealed by 1 & 2 Ph. & M. c. 8, s. 4, and the repeal confirmed by 1 Eliz. c. 1, s. 4.

(*x*) 1 Bl. Com. p. 279.

(*y*) Gilb. Hist. of Exch. c. 4.

upper house, and the lower consists of deans, archdeacons, the proctors for the chapters, and the proctors for the parochial clergy (*z*). The convocations, however, can make no *canons*, or even confer for that purpose, without licence from the sovereign; nor can they make any repugnant to the common or statute law: and none of their canons (as observed in a former place) bind the laity unless they pass both houses of parliament (*a*). And though till the 15 Car. II. c. 10, the beneficed clergy continued to tax themselves in convocation, they have not done so since: it being now judged more advantageous to include them in the money bills passed by the commons, and to allow them on the other hand to vote for members of parliament—a privilege that did not formerly belong to them. Under these circumstances the convocations, though still regularly summoned and assembled together on such summons, have long ceased in fact to exercise any legislative power (*b*). This is subject, however, to a solitary and recent exception; for, on the 26 February, 1861, they proceeded, under the royal licence, to the exercise of such power in a particular instance, viz., as to the repeal of the 29th of the canons of 1603, and the substitution of a new canon convenient for the service of Almighty God, and the better government of His Church; it being at the same time

(*z*) The note by Christian to 1 Bl. Com. p. 280, appears to be inaccurate in stating that the convocation of York consists only of one house. In that province, however, the two houses have not always sat separately. As to non-residentary prebendaries not being able to vote at an election of a proctor, see *Randolph v. Milman*, Law Rep., 2 C. P. 60; 4 C. P. 107.

(*a*) As to the canons of convocation passed in 1603, vide sup. vol. I. p. 66, and the case of *Middleton v. Croft*, Str. 1056, there cited.

(*b*) To the long suspension of the *legislative power* of convocation, is to be added the suspension down to nearly the same period of their *discussions*. These circumstances are attributable to the violent wrangling into which the assembly had been frequently led; and the consequent introduction in the reign of Geo. I., of a practice by which government arrested its proceedings, as a matter of course, by a sudden prorogation immediately after it assembled. Of late years, however, this practice has not been followed.

provided in the royal licence, that such substituted canon should be of no force or effect until, by letters patent under the great seal, it should be confirmed (*c*).

[From this prerogative also, of being the head of the Church, arises the king's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments; which will more properly be considered when we come to treat of the Church (*d*). It will be sufficient at present to observe, that this right now rests upon the statute 25 Hen. VIII. c. 20.]

As head of the Church, the sovereign is likewise the *dernier ressort* in all ecclesiastical causes. This appeal, which may be from the sentence of any ecclesiastical judge (*e*), formerly lay *in chancery* (*f*), but is now brought before the crown in council, and is heard before the Judicial Committee (*g*).

(*c*) The 29th canon referred to in the text relates to the proper *sponsors* for infants who are baptized. A new canon on the subject was agreed to by convocation, but no confirmatory letters patent have yet issued. As to convocations, see 4 Inst. 322; Gilb. Exch. c. 4; Burn's Eccl. Law, Convoc.; Com. Dig. Convoc.; Hallam's Constit. Hist. vol. 3, pp. 236, 324 (3rd edit.)

(*d*) Vide post, bk. IV. pt. II. c. I.

(*e*) See *Gorham v. Bishop of Exeter*, 15 Q. B. 52.

(*f*) 25 Hen. c. 19.

(*g*) It forms one of the provisions of the Judicature Act, 1873, that the appellate jurisdiction of the Judicial Committee in *ecclesiastical* as well as other cases may, by order in council, be transferred to the Court of Appeal by that Act established. (36 & 37 Vict. c. 66, s. 21.)

CHAPTER VII.

OF THE ROYAL REVENUE.



[HAVING, in the preceding chapter, considered at large those branches of the sovereign's prerogative, which contribute to the royal dignity, and constitute the executive power of the government, we proceed now to examine, in the third place, his fiscal prerogatives; that is to say, such as regard his revenue, which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power: being a portion which each subject contributes of his property, in order to secure the remainder (*a*).]

The royal revenue, formerly under the control of the lord treasurer, is now under that of the lords commissioners of the treasury (*b*); who, in modern times, have been appointed in substitution for that high and important officer: but it has always been more immediately under the management of the Exchequer (*c*), which is an establishment of very remote antiquity (*d*)—consisting of two divisions—the first being the office of the receipt of the exchequer, for collection of the royal revenue; the second being a court for the administration of justice (*e*). The former (to which we here exclusively refer) received a new constitution under a modern act of parliament, 4 & 5

(*a*) Vide sup. p. 475.

(*b*) 4 Inst. 103.

(*c*) 2 Inst. 197.

(*d*) Madox, Hist. of Exch.; Gilb. Court of Exch.

(*e*) 4 Inst. ubi sup. As to this court and its constitution, further information will be found, post, bk. v. c. v.

Will. IV. c. 15, and more recently still by 29 & 30 Vict. c. 39; which last statute consolidates the exchequer and *audit* departments, and places them under a “comptroller and auditor-general,” and an assistant, all appointed by the crown and holding their offices during good behaviour (*f*). And by these Acts the commissioners of customs, of inland revenue, the postmaster-general, and other persons accounting to the crown, are directed to make their payments at the Bank of England, into an account to be there opened to the credit of the royal exchequer; and regulations are also made as to the manner of placing sums to the credit of that account, making payments thereout, and auditing the same (*g*).

[The revenue of the crown is either ordinary or extraordinary. The ordinary revenue is such as has either subsisted time out of mind in the crown; or else has been granted by parliament, by way of purchase or exchange for such of the sovereign’s hereditary revenues as were found inconvenient to the subject.

When it is said that it has subsisted time out of mind, it is not to be understood that the crown is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part of it) is at this day in the hands of subjects, to whom it has been granted out from time to time by the kings of England; which has rendered the crown in some measure dependent on the people, for its ordinary support and subsistence. So that it is necessary to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute inherent rights; because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our antient princes. We will now consider the different heads of this ordinary revenue.

(*f*) By 29 & 30 Vict. c. 39, s. 5, *Audit*” are abolished.
the former “Commissioners of (*g*) Sect. 10.

[I. The first of these which shall be taken notice of, is of an ecclesiastical kind, viz. the custody of the temporalities of bishops; by which are meant all the lay revenues, lands and tenements, (in which is included his barony,) which belong to an archbishop's or bishop's see. And these, upon the vacancy of the bishopric, are immediately the right of the sovereign, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishoprics and bishoprics, and to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the crown had the custody of the temporalities of all such abbeys and priories as were of royal foundation, (but not of those founded by subjects,) on the death of the abbot or prior. Another reason may also be given why the policy of the law hath vested this custody in the sovereign: because, as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the sovereign, not the temporalities themselves, but their custody, till such time as a successor is appointed, with power of taking all the intermediate profits, without any account to the successor; and with the right of presenting, (which the crown very frequently exercises,) to such benefices and other preferments as fall within the time of vacation. This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after, it accrued: but by the statute 14 Edw. III. st. 4, c. 4 and 5, the king might, after the vacancy, lease the temporalities to the dean and chapter; saving to himself all advowsons, escheats, and the like (*h*). Our antient kings, and particularly William Rufus, were not only remarkable for keeping the bishoprics a long time vacant (*i*),

(*h*) This Act is repealed by 26 & 27 Vict. c. 125.

(*i*) An instance of this occurred as late as the reign of Queen Eliza-

beth, who kept the see of Ely vacant nineteen years, in order to retain the revenue.—Strype, vol. iv. 351.

[for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate; and, to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, King Henry the first granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take anything from, the domains of the Church, till the successor was installed (*k*). And it was made one of the articles of the great charter, that no waste should be committed in the temporalities of bishoprics, neither should the custody of them be sold (*l*). The same is ordained by the statute of Westminster the first (*m*): and the statute 14 Edw. III. st. 4, c. 4, was still more explicit on this head (*n*). It was also a frequent abuse, that the king would, for trifling or no causes, seize the temporalities of bishops, even during their lives, into his own hands; but this was guarded against by statute 1 Edw. III. st. 2, c. 2.

This revenue, which was formerly very considerable, is now, by a customary indulgence, almost reduced to nothing: for, at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities quite entire and untouched from the crown; and at the same time does homage to his sovereign. And then, and no sooner, he has a fee simple in his bishopric, and may maintain an action for the profits (*o*).

II. The next branch of the royal revenue is also of an ecclesiastical kind, and consists in the first fruits and tenths of all spiritual preferments in the kingdom; both of which shall be considered together (*p*).

(*k*) Matth. Paris.

(*l*) 9 Hen. 3, c. 5.

(*m*) 3 Edw. 1, c. 21.

(*n*) Vide sup. p. 530, n. (*k*).

(*o*) Co. Litt. 67, 341.

(*p*) Blackstone notices (vol. i. p. 284), as two other branches of the royal revenue, first, the right of the crown to a *corody* out of every bishopric; that is, the right to send

[These were originally a part of the papal usurpations over the clergy of this kingdom; first introduced by Pandulph the pope's legate, during the reigns of King John and Henry the third, in the see of Norwich; and afterwards attempted to be made universal by the Popes Clement the fifth and John the twenty-second, about the beginning of the fourteenth century. The first fruits, (*primitiæ* or *annates*,) were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made in the time of Pope Innocent the fourth, by Walter, Bishop of Norwich; and were afterwards advanced in value, in the time of Pope Nicholas the fourth, under a taxation by the king's precept; which valuation (called that of Pope Nicholas) was begun in 1288, and finished in 1292, and is still preserved in the Exchequer(*p*). The tenths, or *decimæ*, were the tenth part of the annual profit of each living by the same valuation; which was also claimed by the holy see, under no better pretence than a strange misapplication of that precept of the Levitical law, which directs, that the Levites "should offer the tenth part of their tithes as a heave-offering to the Lord, and give it to Aaron the high priest"(*q*). But these pretensions of the pope met with a vigorous resistance from the English parliament; and a variety of Acts were passed to prevent and restrain them, particu-

one of the royal chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice (vide sup. vol. I. p. 649, n. (*g*)); secondly, the right of the crown to the *tithes arising in extra-parochial places*: but the former, he apprehends to be fallen into total disuse; and he doubts if either of them is properly to be considered as a part of the royal revenue.

(*p*) 3 Inst. 154; Report on Public Records; Phillips on Evidence, vol.

i. p. 384, 6th edit., where it is also observed that this taxation of Pope Nicholas is an important document, because all the taxes, as well those paid to our kings as those to the pope, were regulated by it, till the survey made in the twenty-sixth year of Henry the eighth; and because the statutes of colleges, which were founded before the Reformation, are still interpreted by this criterion.

(*q*) Numb. xviii. 26.

[Early the statute 6 Hen. IV. c. 1, which calls the payment of first-fruits a horrible mischief and damnable custom (*r*). But the popish clergy, blindly devoted to the will of a foreign master, still kept the papal claims on foot; sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry the eighth, it was computed, that in the compass of fifty years 800,000 ducats had been sent to Rome for first-fruits only. And, as the clergy expressed this willingness to contribute so much of their income to the head of the Church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the Church of England), to annex this revenue to the crown; which was done by statute 26 Hen. VIII. c. 3. By this statute (confirmed by 1 Eliz. c. 4), it was enacted, that commissioners should be appointed in every diocese, to certify the value of every ecclesiastical benefice and preferment, and that according to this valuation the first-fruits and tenths should be collected and paid in future. This *Valor Beneficiorum* was accordingly made, and is that commonly called the *King's Books*, by which the clergy are at present rated (*s*).

By these last-mentioned statutes all vicarages under ten pounds a year, and all rectories under ten marks, are discharged from the payment of first-fruits: and if, in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three quarters; and if two years, then the whole; and not otherwise. The archbishops and bishops have four years allowed for the payment, and shall pay one quarter every year, if they live so long upon the bishopric. But other dignitaries of the Church pay upon the same principle as rectors and vicars. Likewise by the statute 27 Hen. VIII. c. 8, no tenths are to be paid for the first year, for then the first-fruits are due: and by

(*r*) This Act is repealed by 26 & 27 Vict. c. 125.

(*s*) This *valor* will be found in Ecton's Thesaurus.

[other statutes of Queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds per annum clear yearly value, it shall be discharged of the payment of first-fruits and tenths.

Thus the richer clergy being, by the criminal bigotry of their popish predecessors, subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues, through the rapacious disposition of the then reigning monarch: till at length the piety of Queen Anne restored to the Church what had been thus indirectly taken from it. This she did, not by remitting the tenths and first-fruits entirely; but, in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 & 3 Anne, c. 11, whereby all the revenue of first-fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. This is usually called *Queen Anne's bounty*, which has been still further regulated by subsequent statutes(s).

III. The next branch of the ordinary revenue of the sovereign, (which, as well as the subsequent branches, is of a lay or temporal nature,) consists in the rents and profits of the demesne lands of the crown. These demesne lands, *terræ dominicales regis*, being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were antiently very large and extensive; comprising divers manors, honours, and lordships, the

(s) 2 & 3 Anne, c. 11, is sometimes cited as 2 & 3 Anne, c. 20. As to Queen Anne's bounty, see also 1 Geo. 1, st. 2, c. 10; 3 Geo. 1, c. 10; 43 Geo. 3, c. 107; 45 Geo. 3, c. 84, s. 4; 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 20; c. 23, ss. 3, 4; c. 106,

ss. 72, 119; c. 107, s. 10; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20; c. 113, s. 76; 4 & 5 Vict. c. 39, s. 4; 6 & 7 Vict. c. 37; 17 & 18 Vict. c. 84; 23 & 24 Vict. c. 59, s. 7; 33 & 34 Vict. c. 89.

[tenants of which had very peculiar privileges, as has been shown in a former book of these Commentaries, when we spoke of the tenure in antient demesne (*t*). At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and particularly, after King William the third had greatly impoverished the crown, an Act passed, by the effect of which, and of subsequent statutes on the same subject, all grants or leases from the crown of any royal manors, messuages, lands, tenements, rents, tithes, woods or other hereditaments for any longer term than *thirty-one years*, are in general, and subject to certain exceptions, declared to be void (*u*). And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of thirty-one years: that is, where there is a subsisting lease, of which there are twenty years still to come, the crown cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years. The tenant must also be made liable to be punished for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, one-third of the clear yearly value.] In modern times, the superintendence of the royal demesnes has been vested in the Commissioners of Woods, Forests, and Land Revenues (*x*).

(*t*) Vide snp. vol. I. p. 224.

(*u*) 1 Anne, st. 1, c. 7, s. 5; see also 39 & 40 Geo. 3, c. 88; 4 Geo. 4, c. 18; 1 & 2 Vict. c. 95, s. 4; 25 & 26 Vict. c. 37. In order to effect any grant or exchange which would be otherwise ineffectual by reason of these statutes, recourse is had to an Act of parliament authorizing the particular transaction, (see an instance, 22 Vict. c. 9).

(*x*) 14 & 15 Vict. c. 42, s. 1. By this Act, the board of "Commis-

sioners of Woods, Forests, Land Revenues, Works and Buildings," was divided into a board of "Commissioners of Woods, Forests, and Land Revenues," and a board of "Commissioners of Works and Public Buildings." As to the powers of the former board, see 15 & 16 Vict. c. 62, and 16 & 17 Vict. c. 56. To the latter board belongs *inter alia* the management of the royal parks in and near London. (14 & 15 Vict. c. 42, s. 21; and see 35 &

To the same branch of the royal revenue properly belong also such rights and interests as the crown enjoys in the "foreshore." But by 29 & 30 Vict. c. 62, these have now been transferred to the Board of Trade in aid of the reduction of the national debt, and compensation out of the consolidated fund is to be made to the crown for any consequent diminution of its land revenue (*y*). But none of the provisions or restrictions above mentioned, extend to any of the *private* estates of the crown; that is (in general) to such as have been or shall be hereafter purchased or acquired by her Majesty by monies out of her privy purse, or with other monies not appropriated to any public service; or which have, or shall, come to her, her heirs or successors, by gift, devise or inheritance from any of her or their ancestors, or from any other person or persons not being kings or queens of this realm (*z*).

IV. [Hither also might have been referred the advantages which used to arise to the king from the profits of his military tenures, to which most lands in the kingdom

36 Vict. c. 15, "An Act for the Regulation of the Royal Parks and Gardens.") See also as to "Victoria Park," 14 & 16 Vict. c. 46; and as to "Battersea Park," 14 & 15 Vict. c. 77. As to the pleasure grounds on Kennington Common, 15 & 16 Vict. c. 29. As to the public statues within the Metropolitan Police District, 17 & 18 Vict. c. 33. As to extension of Downing Street Public Offices, 18 & 19 Vict. c. 95; as to acquisition of site for public buildings near Whitehall and the palace at Westminster, 22 Vict. c. 19. As to acquisition of space for the western approach to Westminster New Bridge, 22 & 23 Vict. c. 58. As to acquisition of additional land for

the purposes of the public offices, 24 & 25 Vict. c. 33. As to acquisition of part of St. James's Park for the same object, c. 88. As to sale of premises at Windsor, 25 & 26 Vict. c. 57; as to acquiring additional land for public offices, 25 & 26 Vict. c. 74. As to the sale of the Royal Military Canal, 30 & 31 Vict. c. 140.

(*y*) See 29 & 30 Vict. c. 62, ss. 7—15. The "foreshore" includes in this Act "the shore and bed of the sea, and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom, as far up the same as the tide flows." (Sect. 7.)

(*z*) See 25 & 26 Vict. c. 37, amended by 36 & 37 Vict. c. 61.

[were subject, till the statute 12 Car. II. c. 24, which in great measure abolished them all; the explication of the nature of which tenure has already been given in a former book of these Commentaries (*a*). Hither also might have been referred the profitable prerogative of purveyance and pre-emption; which was a right enjoyed by the crown of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. A prerogative which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the king's household, (as well as those of inferior lords,) were supported by specific renders of corn and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate, to furnish viands for the royal use (*b*). And this answered all purposes, in those ages of simplicity, so long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another, (as was formerly very frequently done,) it was found necessary to send purveyors beforehand, to get together a sufficient quantity of provisions and other necessaries for the household. And, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors; who in process of time very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the crown; ready money in open market (when the

(*a*) Vide sup. vol. I. p. 188 et seq.

(*b*) 4th Inst. 273.

[royal residence was more permanent, and specie began to be plenty,) being found upon experience to be the best proveditor of any (*c*). And having fallen into disuse during the suspension of monarchy, King Charles at his restoration consented, by the same statute, (12 Car. II. c. 24,) to resign entirely these branches of his revenue and power; and the parliament, in part recompense, settled on him, his heirs and successors for ever, an excise duty on all beer and ale and certain other liquors sold in the kingdom. So that this hereditary excise, the nature of which shall be further explained in the subsequent part of this chapter, now forms the fourth branch of her majesty's ordinary revenue (*d*).

V. Another branch of the ordinary revenue of the sovereign is usually reckoned to consist in the profits arising from his forests. The nature of forests has been sufficiently explained in a former book of these Commentaries. What we here refer to are only those profits arising to the sovereign from hence, which consisted principally in amercements or fines levied for a variety of offences against forest laws in the forest courts (*e*).]

VI. The profits arising from the sovereign's courts of justice make another branch of his ordinary revenue. And these consist not only in fines imposed on offenders, forfeitures of recognizances, and amercements levied upon defaulters (*f*); but also in certain fees due to the crown in a variety of legal matters. However, the receipts on the

(*c*) Blackstone adds (vol. i. p. 288, citing Mod. Un. Hist. xxxiii. 220), that the powers of purveyance have declined in foreign countries as well as our own; and, particularly, were abolished in Sweden by Gustavus Adolphus, toward the beginning of the seventeenth century.

(*d*) As to the excise, vide post, p. 565.

(*e*) As to forests, vide sup. vol. I. p. 665. As to forest courts, vide post, bk. V. ch. VI.

(*f*) See 3 & 4 Will. 4, c. 99, containing provisions for the more speedy recovery of fines and penalties.

latter account have, by the effect of recent improvements in the administration of justice, been considerably reduced, and are, moreover, now in great measure pre-paid by way of *stamps* affixed to the various documents in use; so that but little, on this head, is now directly returned into the royal exchequer.

VII. We shall class together, as a seventh branch of the sovereign's ordinary revenue, his right to royal fish, wrecks, treasure-trove, waifs and estrays. Our reason for so classing them is, that they are all of the nature of *bona vacantia*, or things found without any apparent owner; and vest in the crown, by way of exception from the general rule of law. For, by that general rule, *bona vacantia* are considered as returning, as it were, into the common stock of mankind, and consequently belong (as in a state of nature) to the first occupant or finder; though he is bound before he appropriates them, to take reasonable pains to discover the former owner, whose right remains, unless they were designedly abandoned by him (*g*). The particular subjects of claim, however, which are above enumerated, are all held to vest in the crown; the true general origin of which peculiarity probably is, (though with respect to some of them other reasons are assigned in the books,) that they were formerly of sufficient value, or of sufficiently frequent occurrence, to attract attention, and to be made the subject of particular regulation; while the other cases of finding were, from their insignificance, neglected, and left to the operation of the ordinary rule of law. The regulation which it was thought proper to make was, that of allotting them to the crown; either to prevent the strife and contention which the mere title of occupancy is apt to create and continue, or else to provide for the support of public authority in the manner the least burdensome to individuals (*h*). In

(*g*) Britt. c. 17; Finch, 177; Armory v. Delamirie, Str. 505; Merry v. Green, 7 Mee. & W. 623.
 (*h*) 1 Bl. Com. p. 299.

point of fact at least, we find that, while the property in all *bona vacantia* is in general vested in the finder, it is annexed to the crown in the particular instances above enumerated (*i*). To consider these instances more particularly. And, first, in the case of—

1. [Royal fish. These are whale and sturgeon, which, when either thrown ashore, or caught near the coast, are the property of the sovereign, on account (as it is said in the books) of their superior excellence (*k*). Indeed, our ancestors seem to have entertained a very high notion of the importance of this right, it being the prerogative of the kings of Denmark and the dukes of Normandy; and from one of these it was probably derived to our princes (*l*). It is expressly claimed and allowed in the statute *De Prærogativâ Regis* (*m*); and the most antient treatises of law now extant make mention of it; though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter (*n*).

2. Shipwrecks are also declared to be the king's property, by the same statute, *De Prærogativâ Regis*; and were so, long before, at the common law. It is worth observation, how greatly the law of wrecks has been altered, and the rigour of it gradually softened in favour of the distressed proprietors. Wreck, by the antient common law, was where any ship was lost at sea, and the goods (or cargo) were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king: for it was held, that by the loss of the ship, all property was gone out of the original owner (*o*). But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was ordained by King Henry the first, that, if any person

(*i*) See Bract. l. 1, c. 12.

(*k*) Plowd. 315. It is said, in the Case of Swans, 7 Rep. 16 a, that a swan is, in like manner, a royal fowl; and that all swans, which have no other known owner, do belong to

the king by his prerogative.

(*l*) See Stiernh. de Jure Sueonum, l. 2, c. 8; Gr. Coustum. c. 17.

(*m*) 17 Edw. 2, c. 11.

(*n*) Vide sup. p. 448.

(*o*) Dr. & St. d. 2, c. 51.

[escaped alive out of the ship, it should be no wreck (*p*); and afterwards, King Henry the second, by his charter (*q*), declared, that if on the coasts of either England, Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements, by King Richard the first; who, in the second year of his reign (*r*), not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet*," but also that, if he perished, his children, or, in default of them, his brethren and sisters, should retain the property; and in default of brother or sister, then the goods should remain in the king (*s*). And the law, as laid down by Bracton in the reign of Henry the third, seems still to have improved in its equity. For then, if only a dog (for instance) escaped, by which the owner might be discovered—nay, if any certain mark were set on the goods, by which they might be known again,—it was held to be no wreck (*t*). And this is certainly most agreeable to reason; the rational claim of the crown being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster the first (3 Edw. I. c. 4), the time of limitation of claims given by the charter of Henry the second was extended to

(*p*) Spelm. Cod. apud Wilkins, 305.

(*q*) 26th May, 1174; 1 Rymer's Fœd. 36.

(*r*) Rog. Hoved. in Ric. 1.

(*s*) In like manner Constantine the Great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury

or fiscus, restrained it by an edict, and ordered them to remain to the owners, adding this humane exposition, "*quod enim jus habet fiscus in alienâ calamitate, ut de re tam luctuosâ compendium sectetur?*" (Cod. ii. 5, 1.)

(*t*) Bract. l. 3, c. 3, s. 5.

[a year and a day, according to the usage of Normandy (*u*); and it enacted, that if a man, a dog, or a cat, escaped alive, the vessel should not be adjudged a wreck. These animals (as in the passage from Bracton) were only put for examples (*x*); for it was established, that not only if any live thing escaped, but if proof could be made of the property of any of the goods or lading which came to shore, they were not forfeited as wreck (*y*). The statute further ordained, that the sheriff of the county should be bound to keep the goods a year and a day,—as in France for one year, agreeably to the maritime laws of Oleron (*z*), and in Holland for a year and a half,—so that if any man could prove a property in them, either in his own right or by right of representation, they should be restored to him without delay; but if no such property be proved within that time, they then should be the king's (*a*). If the goods were of a perishable nature, the sheriff might sell them, and the money was to be liable in their stead (*b*). This revenue of wrecks was frequently granted out to lords of manors as a royal franchise; but if any one were thus entitled to wrecks in his own land, and the goods of the sovereign were wrecked thereon, the sovereign might claim them at any time, even after the year and day (*c*).

It is to be observed, that, in order to constitute a legal *wreck*, the goods must come to land (*d*). If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *ligan*. Jetsam, is where goods are cast into the sea, and there sink and remain under water; flotsam, is where they continue swimming on the surface of the waves; ligam, is where they are sunk in the sea, but tied to a cork or buoy,

(*u*) Gr. Coustum. c. 17. It may be noticed that 3 Ed. 1, c. 4, was repealed by 26 & 27 Viet. c. 125.

(*x*) Flet. l. 1, c. 44; 2 Inst. 167; 5 Rep. 107.

(*y*) See *Hamilton v. Davies*, 5 Burr, 2732.

(*z*) Ll. Ol. s. 28.

(*a*) 2 Inst. 168.

(*b*) Plowd. 466.

(*c*) 2 Inst. ubi sup.; Bro. Abr. tit. Wreck.

(*d*) See *Palmer v. Rouse*, 3 H. & N. 505.

[in order to be found again (*e*). Such goods are also the crown's, if no owner appears to claim them; but if any owner appears, he is entitled to recover the possession. For even if they be cast overboard without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property (*f*): much less can things *ligan* be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are accounted so far a distinct thing from the former, that by the royal grant to a man of *wrecks*, things jetsam, flotsam, and ligam will not pass (*g*).

Wrecks, in their legal acceptation, are at present not very frequent; for if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and in a spirit quite opposite to those savage laws which formerly prevailed in all the northern regions of Europe (*h*), our laws have made many humane regulations.] For by the common law, if any persons (other than the sheriff) took any goods cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel restitution (*i*); and, in accordance herewith, it was provided by the statute 27 Edw. III. c. 13 (*k*), that if any ship were lost on the shore, and the goods came to land, (which cannot, says the statute, be called wreck,)

(*e*) Constable's case, 5 Rep. 106.

(*f*) So, in the civil law, "*Quæ enim res in tempestate levandæ navis causa ejiciuntur, hæ dominorum permanent. Quia palam est, eas non eo animo ejici quod quis eas habere nolit.*" Inst. 2, 1, 48.

(*g*) Constable's case, 5 Rep. 108.

(*h*) On the coasts of the Baltic Sea, in particular, the inhabitants

were long permitted to seize on whatever they could get as lawful prize; or, as an author of their own expresses it, "*in naufragorum miseriam et calamitatem, tanquam ruitures ad prædam currere.*" (1 Bl. Com. p. 293, citing Stiernh. de Jure Sueon. l. 3, c. 5.)

(*i*) F. N. B. 112.

(*k*) This Act is not mentioned in the revised edition of the statutes.

they should presently be delivered to the merchants, paying only a reasonable reward (or *salvage*) to those that saved and preserved them. And many additions to the law of wreck and salvage have been made in modern times, which have placed these subjects on a satisfactory footing—particularly by the provisions inserted in the eighth part of the 17 & 18 Vict. c. 104 (called “The Merchant Shipping Act, 1854”), as amended by 25 & 26 Vict. c. 63—called “The Merchant Shipping Act Amendment Act, 1862” (*k*). By these enactments it is provided, that the Board of Trade shall have the general superintendence of all matters relating to wreck—which, for the purpose of the Acts, includes things jetsam, flotsam, and ligan (*l*);—and power is given to such board, with the consent of the Treasury, to appoint *receivers of wreck* in different districts; who are authorized to summon as many men as may be necessary, to demand help from any ship near at hand, or to press into their service any neighbouring waggons, carts, or horses, for the purpose of preserving or assisting any stranded or distressed vessel, or her cargo, or for the saving of human life; and a penalty is established in case their demands are not complied with (*m*). The same Acts contain also copious provisions in reference to salvage for services rendered, and the manner in which its amount is to be assessed in case of dispute, which (in cases below a certain amount) may either be before the judge of a neighbouring county court or before justices of the peace (*n*). And as to *wreck*

(*k*) See also the 18 & 19 Vict. c. 91 (called “The Merchant Shipping Act Amendment Act, 1855”), ss. 19, 20; and the 24 & 25 Vict. c. 10, s. 9.

(*l*) But see *Palmer v. Rouse*, 3 H. & N. 505. The word “wreck” under 17 & 18 Vict. c. 104 (sect. 2) also includes “derelict” found in or on the shores of the sea or any

tidal water. Things derelict are such as are voluntarily abandoned as worthless. (See *Legge v. Boyd*, 1 C. B. 112.)

(*m*) 17 & 18 Vict. c. 104, ss. 439, 441, 442.

(*n*) Sects. 458, 460, 484; 25 & 26 Vict. c. 63, ss. 49, 50. (See *Beadnell v. Beeson*, Law Rep., 3 Q. B. 439.) But see 31 & 32 Vict. c. 71, s. 5.

found, it is provided, that any finder (other than the owner) must deliver the same, as soon as possible, to the receiver of the district; and, even if owner, must give notice of the find to that officer (*o*). And if no owner establishes his claim to wreck so found, before the expiration of a year, and no person, other than the crown, is proved to be entitled to the same—then it is to be sold by the receiver, and the proceeds thereof, after payment of all expenses and the salvage, if any, is to be paid into the exchequer as part of the consolidated fund (*p*). Other provisions have also been made, with a view to prevent the disgraceful practices of *wrecking* which formerly obtained on some of our sea coasts. For by the 17 & 18 Vict. c. 104, s. 477, if any ship stranded or in distress on or near the shore, be plundered or damaged by persons riotously and tumultuously assembled together, full compensation shall be made to the owner, by the *hundred* (or other district in the nature thereof) in or nearest to which the offence is committed, in the manner by law provided in cases of the destruction of churches and other buildings by a riotous assemblage (*q*). Moreover, by 24 & 25 Vict. c. 96, s. 64, persons plundering or stealing wreck are declared guilty of felony, and made liable to penal servitude for fourteen years; or to imprisonment not exceeding two years, with or without hard labour and solitary

(*o*) 17 & 18 Vict. c. 104, s. 450.

(*p*) Sect. 475. But such of the proceeds of wreck as shall belong to her Majesty in right of her *duchy of Lancaster*, or shall belong to the *duchy of Cornwall*, shall form part of the revenue of such duchies respectively. (25 & 26 Vict. c. 63, s. 53.) It may be remarked, that wrecked goods are subject to the same duties (on being brought or coming into this kingdom), as they would have been

liable to, if imported. (17 & 18 Vict. c. 104, s. 499.) As to salvage within the boundaries of the *cinqve ports*, see 1 & 2 Geo. 4, c. 76, ss. 1—5, 15, 16, and 18; 17 & 18 Vict. c. 104, s. 460.

(*q*) The provision as to the liability of the hundred in such cases is now contained in 24 & 25 Vict. c. 97, ss. 11, 12, the previous enactments in 7 & 8 Geo. 4, c. 31, having been repealed by 24 & 25 Vict. c. 95.

confinement (*s*). And by 24 & 25 Vict. c. 97, s. 47, persons exhibiting any false light or signal, with intent to bring a ship into danger, or doing any other malicious act tending to the immediate loss of a ship, may be sentenced to penal servitude for *life* or other less punishment as specified in the Act (*t*).

3. [Treasure-trove, *thesaurus inventus*, is where any money, coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown. And in such case the treasure found belongs to the crown; but if he that hid it be known, or afterwards found out, the owner, and not the sovereign, is entitled to it (*u*). It is the hiding, we may observe, and not the abandoning of it, that gives the king a property: Braeton defining it, in the words of the civilians, to be "*vetus depositio pecuniæ*" (*x*). For if a man scatters his treasure into the sea, or upon the surface of the earth, it belongs, by the general rule of law already noticed, not to the sovereign but to the first finder (*y*).

Formerly indeed, by the effect of that general rule, treasure trove whether hidden, lost or abandoned belonged to the finder. But afterwards it was judged expedient, for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king; which part was assigned to be all *hidden* treasure; as distinguished from such as is either casually lost or designedly abandoned by the former owner. And that the prince shall be entitled to this hidden treasure, is now grown to

(*s*) See 27 & 28 Vict. c. 47.

(*t*) By the civil law, to destroy persons shipwrecked, or prevent their saving the ship, was punishable with death; and to steal even a plank from a vessel in distress, or wrecked, made the party liable to answer for the whole ship and cargo. (Ff. 47, 9, 3.) In our own law, the provision previously in force on this subject, (7 Will. 4 & 1 Vict. c. 89,

s. 5,) also made this offence of wilfully bringing a ship into danger by false lights, &c. a *capital* felony. That Act was repealed by 24 & 25 Vict. c. 95.

(*u*) 3 Inst. 132; Dalton of Sheriffs, c. 16.

(*x*) L. 3, c. 3, s. 4.

(*y*) Braet. l. 3, c. 3; 3 Inst. 133; sup. p. 539.

[be, according to Grotius, "*jus commune, et quasi gentium*," for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark (*z*). The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution, than at present (*a*). Hence the punishment of such as concealed from the king the finding of hidden treasure, was formerly no less than death (*b*).

4. Waifs, *bona waviata*, are such goods stolen as are waived (or thrown away) by a thief in his flight, for fear of being apprehended. These are given by the law to the sovereign, as a punishment upon the owner (according to the books) for not himself pursuing the felon, and taking away his goods from him (*c*). And therefore if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making *fresh suit*), or do prosecute him to conviction, he shall have his goods again (*d*). So if the party robbed can seize them before they are seized for the crown, though at the distance of twenty years, the crown will never have them (*e*). It is also to be observed, that if the goods are hid by the thief or left anywhere by him, so that he had them not about him when he fled, and therefore did not throw them away in his flight,—these are not *bona waviata*, but the owner may have them again when he pleases (*f*). Also the goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs (*g*); the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

(*z*) De Jur. B. & P. l. 2, c. 8,
s. 7.

(*a*) See 1 Bl. Com. p. 296.

(*b*) Glanv. l. 1, c. 2; Crag. l. 16,
40. See 3 Inst. 133.

(*c*) Cro. Eliz. 694.

(*d*) Finch, L. 212.

(*e*) Ibid.

(*f*) Constable's case, 5 Rep. 109.

(*g*) Fitz. Abr. tit. Estray, 1; 3
Bulstr. 19.

[5. Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the sovereign; and they now most commonly belong to the lord of the manor, by special grant from the crown. But, in order to vest an absolute property in the crown or its grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found. And then, if no man claims them, after proclamation and a year and a day passed, they belong to the sovereign or his substitute without redemption (*h*), even though the owner be a minor, or under any other legal incapacity (*i*). If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them. The crown or lord has no property in such animals till the year and day has passed; for if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again (*k*). Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine and horses,—all, indeed, which we in general call cattle; and so Fleta defines them, “*pecus, vagans, quod nullus petit, sequitur, vel advocat*” (*l*). But animals *feræ naturæ*, and not held by the antient law to be valuable, as a dog or cat, bear or wolf, cannot be considered as estrays (*m*); though swans are said to be an exception to this rule (*n*). The reason why in general the doctrine of estrays is applicable only to animals *domitæ naturæ*, seems to be that the owner’s property in them is not lost merely by their temporary escape; and they also,

(*h*) Mirr. c. 3, s. 19.

(*i*) Constable’s case, 5 Rep. 108; Bro. Abr. tit. Estray; Cro. Eliz. 716. So, by the old Gothic constitution, all things found were to be proclaimed “*primum coram comitibus et viatoribus obviis, deinde in proximâ villâ vel pago, post-*

“*remo coram ecclesiâ vel iudicio,*” and a year was allowed for the owner to reclaim his property. (Stiernh. de Jur. Goth. l. 3, c. 5.)

(*k*) Finch, L. 177.

(*l*) L. 1, c. 43.

(*m*) 1 Bl. Com. 298.

(*n*) Case of Swans, 7 Rep. 17 a.

[from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and a day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions, and preserve it from damage(*o*); and may not use it by way of labour, but is liable to an action for so doing(*p*). Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit, of the animal(*q*).

VIII. Another branch of the ordinary revenue, the right to mines, has its original from the sovereign's prerogative of coinage, in order to supply him with materials; and therefore those mines which are properly royal(*r*), and to which the crown is entitled when found, are only those of silver and gold(*s*). But by the old common law, if gold or silver were found in mines of base material, according to the opinion of some, the whole was a royal mine, and belonged to the king; though others held that it only did so if the quantity of gold or silver was of greater value than the quantity of base metal(*t*.)] But now by 1 W. & M. st. 1, c. 30, 5 W. & M. c. 6, and 55 Geo. 3, c. 134, this difference is made immaterial; it being thereby enacted that no copper, tin, iron or lead mines shall be deemed royal mines, whatever quantity of gold or silver may be extracted from them; but that the sovereign (or his grantees) may have the ore on paying for the same a price stated in the Acts. [This is an extremely reasonable law; for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the sovereign depart from the just rights of his revenue, since he may have all the precious metal contained in the ore, paying no more for it

Gold & Silver Mines
3 Lish.
5033.
Gold & Silver Mines
Queen's
Hollym
v. Nov
1 app. 2

(*o*) 1 Roll. Abr. 879.

(*p*) Cro. Jac. 147.

(*q*) Ibid. 148; Noy, 119.

(*r*) As to the coal and iron mines in the royal forest of Dean, see 1

& 2 Vict. c. 43; 24 & 25 Vict. c. 40;

34 & 35 Vict. c. 85.

(*s*) 2 Inst. 577.

(*t*) Plowd. 336.

[than the value of the base metal which it is supposed to be ; to which base metal the landowner is by reason and law entitled (*u*).]

IX. and X. The two remaining branches of the crown's ordinary revenue are those which arise from escheats and the custody of idiots ; but though in point of order they require here to be enumerated, the mere enumeration will suffice, as they have been both discussed, as far as the plan of the work permitted, in former chapters (*x*).

Until recently, another branch of the revenue consisted in the forfeitures which ensued, on conviction, of a felon's lands and goods—*bona confiscata*, as they are called by the civilians, because they belonged to the *fiscus* or imperial treasury ; or, as our lawyers termed them, *forisfacta*, that is, such whereof the property is gone away from the owner. And it may be observed that the ground of forfeiture of property for crime appears to consist in the fact that property itself is derived from society ; being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man sacrifices by being member of a social community. If therefore such a member violates the fundamental contract of his association, by transgressing the municipal law, he may be said to forfeit his right to such privileges as he claims by that contract ; and that the state may justly resume that portion of property, or any part of it, which the laws have before assigned him. But, as we shall have occasion to explain more particularly

(*u*) The tin ore in Devon and Cornwall is excepted from these Acts. As to such ore see 1 & 2 Vict. c. 120 ; as to tin ore in Cornwall, 2 & 3 Vict. c. 58, s. 1 ; as to lead ore in Durham, 21 & 22 Vict. c. 58 ; as to mines and minerals,

generally, in Cornwall, see 21 & 22 Vict. c. 109.

(*x*) As to escheats, vide sup. vol. 1. pp. 435 et seq. ; as to the crown's custody of idiots, vide sup. p. 508.

hereafter, by the present law of England no forfeiture of property takes place on the conviction of its owner for felony (*y*); and therefore this branch of the ordinary *census regalis* no longer exists. But before we pass on from this head we will make some mention of one species of forfeiture, called a *deodand*, which arose from the misfortune rather than the crime of the owner.

Whatever personal chattel was the immediate and accidental occasion of the death of any reasonable creature was called a deodand, and became forfeited to the crown. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church: in the same manner as the apparel of a stranger who was found dead, was applied to purchase masses for the good of his soul (*z*). With regard to the law of deodands it may be mentioned that where a thing not in motion was the occasion of a man's death, that part only which was the immediate cause was forfeited; as if a man, climbing up the wheel of a cart, was killed by falling from it, the wheel alone was a deodand (*a*); but whenever the thing was in motion, not only that part which immediately gave the wound (as the wheel which ran over his body), but all things which moved with it, and helped to make the wound more dangerous (as the cart and loading, which increased the pressure of the wheel), were forfeited (*b*).

(*y*) Vide post, bk. VI. chapters XXIII. and XXV.

(*z*) 1 Bl. Com. 301; Fitz. Abr. tit. Enditement, pl. 27; Staunf. P. C. 20, 21. Blackstone further remarks, in reference to deodands, that they were in part grounded on the idea that such misfortunes were always more or less owing to the negligence of the owner of the chattel, who was, therefore, properly punished by the forfeiture. He adds,

“a like punishment is, in like cases, “inflicted by the Mosaical law (Ex. xxi. 28): ‘if an ox gore a man that “he die, the ox shall be stoned, and “his flesh shall not be eaten.’ And “among the Athenians, whatever “was the cause of a man's death, “by falling on him, was exterminated or cast out of the dominions of the republic.”

(*a*) 1 Hale, P. C. 422.

(*b*) 1 Hawk. P. C. c. 26.

And it mattered not whether the owner were concerned in the killing or not; for if a man killed another with my sword, the sword was forfeited as an accursed thing (*d*). Hence, in all indictments for homicide, the value of the instrument of death as well as its description used to be found by the grand jury, to enable the crown or its grantee to claim the deodand; for it was no deodand unless it were presented as such by a jury (*e*). But in modern times juries very frequently took upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. And, in such cases, although the finding by the jury were hardly warrantable by law, the Court of Queen's Bench generally refused to interfere (*f*). It was however obviously better that a law so repugnant to the feelings of mankind should be abandoned, than that the solemn oath under which a juror gives his verdict should be thus evaded. Indeed, its manifest unreasonableness and inconvenience, as well as unpopularity, called loudly for its abolition. This improvement was accordingly carried into effect by 9 & 10 Vict. c. 62; by which it was enacted, that from 1st September, 1846, there should be no forfeiture of any chattel in respect of the same having moved to or caused the death of man. Before concluding this head, we will add that deodands and other forfeitures (as well as wrecks, treasure-trove, royal fish, mines, waifs, and estrays) might be granted by the sovereign to particular subjects, as a royal franchise: and indeed they were for the most part granted out to the lords of manors, or other liberties, to the perversion of their original design (*g*).

[This may suffice therefore for a short view of the

(*d*) Doct. & Stud. d. 2, c. 51.

Ad. & El. 19; R. v. Polwart, 1 Q.

(*e*) 3 Inst. 57. As to the former law of deodand, see *The Queen v. The Eastern Counties Railway*, 10 M. & W. 58; R. v. Brownlow, 11

B. 818.

(*f*) See 1 Bl. Com. 300.

(*g*) Ibid.

[sovereign's ordinary revenue, or the proper patrimony of the crown; which was very large formerly, and capable of being increased to a magnitude truly formidable; for there are very few estates in the kingdom that have not, at some period or other since the Norman conquest, been vested in the hands of the king by forfeiture, escheat, or otherwise.] But both the hereditary landed revenue, and the casual profits arising from the other branches of the *census regalis*, are now, by the gradual effect of improvident management, by royal grants to subjects, and by other causes, reduced to comparative insignificance (*h*).

This diminution, however, has been attended with no real loss or disparagement to the crown. For as its ordinary revenue, even when most flourishing, did not suffice on all occasions for the exigencies of the state, our ancestors were obliged, at very early periods of the national history, to supply the public necessities by contributions from their private means; which formed an *extraordinary* revenue for the crown, in addition to its proper patrimony. These burthens gradually increased, until at length, in later times, they swelled into the modern system of *taxation*, by means of which a large annual sum is now raised, applicable generally to the whole expenditure of the state, —comprising not only what is required for the public service in the strict sense of the term, but for the maintenance and dignity of the royal person and household. The remains of the patrimonial revenue of the crown are, on the other hand, no longer specifically applied to the sovereign's private purposes, but are now mixed with the produce of taxation, so as to form part of a common fund which thus constitutes the national income.

These contributions by way of taxation have been at different periods called by the synonymous names of

(*h*) See 16 & 17 Vict. c. 56, and 29 & 30 Vict. c. 62, s. 11, as to certain charges on, and arrangements as to, the hereditary possessions and landed revenue of the crown.

aids, subsidies, and supplies; and are granted, by the Commons of Great Britain and Ireland in Parliament assembled (*k*); who, when they have voted a supply to the crown, and settled the *quantum* of that supply, usually resolve themselves into what is called a *committee of ways and means*, to consider the ways and means of raising the supply so voted. And in this committee any member may propose such scheme of taxation as he thinks will be least detrimental to the public, though it is looked upon as the peculiar province of the Chancellor of the Exchequer, to whom it belongs to bring forward annually his financial statement for the year, usually called his Budget. The following taxes are now imposed by law. I. The Land-tax; II. The Customs; III. The Excise and Assessed Taxes; IV. The Post-Office Duties, V. The Stamp Duties; VI. The Duty on Offices and Pensions. VII. The Income Tax: but this last is not considered as a *permanent* charge on the subject, wherein it differs from the others in the list. Of each of these taxes we will now give some account.

[I. The Land-tax. This has come in the place of the antient method of rating property, or persons in respect of their property, by tenths or fifteenths, subsidies on lands, hydages, scutages, or talliages; a short explication of which will, however, greatly assist us in understanding our antient laws and history. Tenths and fifteenths were temporary aids issuing out of personal property, and granted to the king by parliament (*l*). They were formerly the real tenth or fifteenth part of all the moveables belonging to the subject, at a time when such moveables or personal estates were a very different and much less considerable thing than what they usually are at this day. Tenths are said to have been first granted under Henry

(*k*) Vide sup. p. 347.

(*l*) 2 Inst. 77; 4 Inst. 34.

[the second; who took advantage of the fashionable zeal for crusades, to introduce this new taxation, in order to defray the expense of a pious expedition to Palestine, which he really or seemingly had projected against Saladine, emperor of the Saracens: whence it was originally denominated the Saladine tenth (*m*). But afterwards fifteenths were more usually granted than tenths. Originally the amount of these taxes was uncertain; being levied by assessments new made at every fresh grant of the commons, a commission for which is preserved by Matthew Paris (*n*); but it was at length reduced to a certainty, in the eighth year of Edward the third, when, by virtue of the king's commission, new taxations were made of every township, borough and city in the kingdom, and recorded in the Exchequer: which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29,000*l.*; and therefore it still kept up the name of a fifteenth, when, by the alteration of the value of money, and the increase of personal property, things came to be in a very different situation. So that when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid, in the eighth of Edward the third; and then raised it by a rate among themselves and returned it into the royal exchequer.

The other antient levies were in the nature of a land-tax; for we may trace up the original of that charge as high as to the introduction of our military tenures, when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of

(*m*) Hoved. A.D. 1188; Carte, L. (*n*) A.D. 1232.
719; Hume, i. 329.

[time by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of scutages; which appear to have been levied for the first time in the fifth year of Henry the second, on account of his expedition to Toulouse (*o*). And such assessments were then, it would seem, mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards abused into a means of oppression (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent expenses), it became thereupon a matter of national complaint; and King John was obliged to promise, in his Magna Charta (c. 12), that no scutage should be imposed without the consent of the common council of the realm. This clause was indeed omitted in the charters of Henry the third, where we only find it stipulated, that scutages should be taken as they were used to be in the time of King Henry the second (*p*). Yet afterwards, by a variety of statutes under Edward the first and his grandson (*q*), it was provided, that the king shall not take any aids or tasks, any talliage or tax, but by the common assent of the great men and commons in parliament (*r*).

Of the same nature with scutages upon knights' fees were the assessments of hydage upon all other lands, and of talliage upon cities and burghs (*s*). But they all gradually fell into disuse upon the introduction of subsidies, about the time of King Richard the second, and King Henry the fourth. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s.* in the pound for lands, and 2*s.* 8*d.* for goods; and for those

(*o*) Vide sup. vol. I. p. 201.

(*p*) See 9 Hen. 3, c. 37.

(*q*) See 25 Edw. 1, cc. 5 and 6;
34 Edw. 1, st. 4, c. 1; and 14 Edw. 3,

st. 2, c. 1.

(*r*) Vide sup. p. 470, n. and vol. I.
pp. 165, 166, 202.

(*s*) Madox, Hist. Exch. 480.

[of aliens, in a double proportion (*t*). It was antiently the rule never to grant more than one subsidy and two fifteenths at a time; but this rule was broken through, for the first time, on a very pressing occasion, the Spanish invasion in 1588; when the parliament gave Queen Elizabeth two subsidies and four fifteenths. Afterwards, as money sank in value, more subsidies were given; and we have an instance, in the first parliament of 1640, of the king's desiring twelve subsidies of the commons to be levied in three years; which was looked upon as a startling proposal: though Lord Clarendon says that the speaker, Serjeant Glanville, made it manifest to the house how very inconsiderable a sum twelve subsidies amounted to, by telling them he had computed what he was to pay for them himself; and when he named the sum, he being known to be possessed of a great estate, it seemed not worth any further deliberation (*u*).

The grant of scutages, talliages, or subsidies, by the commons, did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves, in convocation (*x*): but these grants of the clergy were confirmed in parliament, otherwise they were illegal and not binding, as the same noble writer observes of the subsidies granted by the convocation, which continued sitting after the dissolution of the first parliament in 1640. A subsidy granted by the clergy was after the rate of 4*s*.

(*t*) Blackstone adds here (vol. i. 310), "But this assessment was also made according to an antient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceedingly low, that one subsidy of this sort did not, according to Sir E. Coke, amount to more than £70,000; whereas a modern land-tax, at

"the same rate, produces about two millions."

(*u*) Hist. b. 2. Blackstone adds, (vol. i. ubi sup.) "And, indeed, upon calculation, we shall find that the total amount of these twelve subsidies, to be raised in three years, is less than what would be now raised in one year, by a land-tax of 2*s*. in the pound."

(*x*) As to convocation, vide sup. p. 525.

[in the pound, according to the valuation of their livings in the king's books; and amounted, as Sir Edward Coke tells us, to about 20,000*l.* (*y*). While this custom continued, convocations were wont to sit as frequently as parliaments; but the last subsidies thus given by the clergy were those confirmed by statute 15 Car. II. c. 10; since which, another method of taxation has generally prevailed, which takes in the clergy as well as the laity; in recompense for which (as already mentioned), the clergy have from that period been allowed to vote at the election of members of parliament in respect of their benefices (*z*); and thenceforward the practice of giving ecclesiastical subsidies has fallen into total disuse.]

No subsidies were granted either by laity or clergy after the year 1633 (*a*), but periodical assessments of a specific sum upon the several counties of the kingdom, to be levied by a pound rate on lands and personal estates, were granted as the national emergencies required—a practice which was first introduced by the parliament of Charles the first in order to support themselves and their measures (*b*). [These periodical assessments, the subsidies which preceded them, and the more antient scutage, hydage, and talliage, were to all intents and purposes, so far as they charged the land, a land-tax; and the assessments were sometimes expressly called so (*c*). Yet a popular opinion has prevailed, that the land-tax was first introduced in the reign of King William the third; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom; which, though by no means a perfect one, had this effect, that a supply of 500,000*l.* was equal to one shilling in the pound of the value of the estates given in.]

According to the enhanced valuation just mentioned,

(*y*) 4 Inst. 33.

cc. 9, 10.

(*z*) Dalt. of Sh. 334; Gilb. Hist. of Exch. c. 4; vide sup. p. 526.

(*b*) 1 Bl. Com. 312.

(*c*) Com. Journ. 26th June, 9th

(*a*) The latest were by 15 Car. 2,

Dec. 1678.

the land-tax was imposed by 4 Will. III. c. 1; and has ever since continued a permanent charge upon land (*d*); for by 38 Geo. III. c. 60, this tax (which had long become an annual) was converted into a perpetual one, and fixed at four shillings in the pound (*e*); but made subject, on the other hand, to redemption by the landowner (*f*). The tenant of the land is also, by 38 Geo. III. c. 5, s. 17, liable to a distress, in the event of this tax remaining in arrear; but is, by the same enactment, entitled to deduct the amount which he has paid for it, (unless he has expressly agreed to pay all taxes,) out of the first sum that shall become due for rent; the tax being, as between landlord and tenant, a charge upon the former, in the absence of any special engagement. Yet if the tenant has, to any extent, a beneficial interest, and does not hold at a rack-rent, he becomes liable *pro tanto*, and can only charge the residue on his landlord—the tax being one imposed by the law on the *beneficial proprietor* of the land (*g*).

(*d*) Under 4 Will. 3, c. 1, (as in the case of the periodical assessments referred to in the text,) the sum granted was levied on *personal* as well as landed property. This was altered by 3 & 4 Will. 4, c. 12.

(*e*) A particular sum is charged on each county in accordance with the valuation referred to in the text, and the proportion of each individual liable is assessed by commissioners appointed by the crown, and named in Acts of Parliament: see 7 & 8 Geo. 4, c. 75; 29 & 30 Vict. c. 59; 30 & 31 Vict. c. 51; 32 & 33 Vict. c. 64.

(*f*) As to redemption of land-tax, 42 Geo. 3, c. 116, s. 180; 16 & 17 Vict. c. 74; c. 90, s. 8; c. 117; 19 & 20 Vict. c. 80, s. 3; 24 & 25 Vict. c. 91, ss. 39–46. See also the case of *Kilderbee v. Ambrose*, 10 Exch. 454.

(*g*) *Ward v. Const*, 10 Barn. & Cress. 635. As to the land-tax, see also the following cases:—*Graham v. Wade*, 16 East, 29; *Stubbs v. Parsons*, 3 Barn. & Ald. 516; *Hyde v. Hill*, 3 T. R. 377; *The Attorney-General v. Hill*, 2 Mec. & W. 160; *Charleton v. Alway*, 11 Ad. & El. 993; *Blewit v. Phillips*, 1 Q. B. 84; *Queen v. Land Tax Commissioners*, 2 Ell. & Bl. 694; *Charing Cross Bridge Company v. Mitchell*, 4 Ell. & Bl. 549; *Lord Colchester v. Kewney*, Law Rep., 2 Exch. 253; and these statutes:—42 Geo. 3, c. 116; 54 Geo. 3, c. 173; 6 Geo. 4, c. 32; 4 & 5 Will. 4, c. 60; 5 & 6 Will. 4, c. 20; 6 & 7 Will. 4, c. 80; 7 Will. 4 & 1 Vict. c. 17; 1 & 2 Vict. cc. 57, 58; 5 & 6 Vict. c. 37; 16 & 17 Vict. cc. 74, 90, 117; 17 & 18 Vict. c. 85; 19 & 20 Vict. c. 80, ss. 2, 4; 20 & 21 Vict. c. 46;

[II. The customs; *i. e.* the duties, toll, tribute, or tariff payable upon merchandize exported and imported. The considerations upon which this revenue, (or the more antient part of it, which arose only from exports,) was invested in the king, have been said to be two (*h*). 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound, of common right, to maintain and keep up the ports and havens, and to protect the merchant from pirates. But however this may be, the right of the Crown to these customs clearly originated in the grant of parliament (*i*). And indeed this is in express words confessed by statute 25 Edward I. (*Confirmatio Cartarum*), wherein the king promises to take no customs from merchants, without the common assent of the realm, “saving to us and our heirs “the customs on wool, skins, and leather, formerly granted “to us by the commonalty aforesaid.” These were formerly called the hereditary customs of the Crown; and were, at first, due on the exportation only of the said three commodities, and of none other; which were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports where the king’s staple was established, in order to be there first rated and then exported (*k*). These duties were also called *custuma antiqua sive magna*; and they were payable by every merchant, as well native as stranger; with this difference, that merchant strangers paid an additional toll, viz. half as much again as was paid by natives. But there was afterwards a duty known as the *custuma parva et nova*, which was an impost of three-pence in the pound, due from merchant strangers only, for all commodities, as well imported as exported. This was usually called the alien’s duty, and

24 & 25 Vict. c. 91, ss. 39—46; 32
& 33 Vict. c. 14, Part II.; 34 Vict.
c. 21.

(*i*) 2 Inst. 58, 59.

(*k*) As to the *staple* in trading
towns, vide sup. vol. I. p. 309.

(*h*) Dyer, 165.

[was first granted in the thirty-first year of Edward the first (*l*).

There is also another very ancient hereditary duty (or custom) belonging to the Crown, called the *prisage* or *butlerage* of wines; which is taken notice of in the great roll of the exchequer, 8 Richard I. (*m*). *Prisage* was a right of taking two tuns of wine from every ship (English or foreign) importing into England twenty tuns or more; one before and one behind the mast; but this, by charter of Edward the first, was exchanged into a duty of two shillings for every tun imported by merchant strangers, and was then called *butlerage*, because paid to the king's butler (*n*).

Other customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna*: tonnage was a duty upon all wines imported, over and above the *prisage* and *butlerage* aforesaid: poundage was a duty imposed *ad valorem*, at the rate of twelve pence in the pound, on all other merchandize whatsoever: and the other imposts were such as were occasionally laid on by parliament, as circumstances and time required (*o*). The imposts of tonnage and poundage in particular, were first granted, as the old statutes, (and particularly 1 Eliz. c. 20,) expressed it, for the defence of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandize safely to come into and pass out of the same. They were at first usually granted only for a stated term of years; as, for two years in the fifth year of Richard

(*l*) 4 Inst. 29. By the more modern law, however, aliens have been placed on the same footing, with respect to customs, as natural born subjects.

(*m*) See Madox, Hist. Exch. 526, 532.

(*n*) Dav. 8; 2 Bulstr. 254; Stat. of Estreats, 16 Edw. 2; Com. Journ. 27th April, 1689.

(*o*) Dav. 11, 12.

[the second (*p*): but in Henry the sixth's time they were granted him for life, by a statute in the thirty-first year of his reign; and again to Edward the fourth, for the term of his life also: since which time they were regularly granted to all his successors for life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of Charles the first; when, as Lord Clarendon expresses it, his ministers were not sufficiently solicitous for a renewal of this legal grant (*q*). And yet these imposts were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together; which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For the king, previously to the commencement of hostilities, gave the nation satisfaction for the error which had been committed, by passing an Act (16 Car. I. c. 8), whereby he renounced all power in the Crown of levying the duty of tonnage and poundage, without the express consent of parliament; and also all power of imposition upon any merchandizes whatever. Upon the restoration, this duty was granted to King Charles the second for life, and so it was to his two immediate successors; but it was afterwards by three several statutes, (9 Anne, c. 6, 1 Geo. I. c. 12, and 3 Geo. I. c. 7,) made perpetual, and mortgaged for the debt of the public. The customs were at first chiefly contained in two books of rates, set forth by parliamentary authority (*r*), one signed by Sir Harbottle Grimstone, speaker of the House of Commons, in Charles the second's time; and the other an additional one, signed by Sir Spencer Compton, speaker in the reign of George the first; to which also subsequent additions were afterwards made.] But in the year 1787 was passed the 27 Geo. III. c. 13, called the Customs Consolidation Act, by which the amount of duties and the articles on which

(*p*) Dav. 12.(*q*) Hist. Reb. b. 3.(*r*) Stat. 12 Car. 2, c. 4; 11 Geo.

1, c. 7.

they should be levied were defined, and these two books of rates declared to be of no avail for the future. The law of customs, thus simplified and consolidated, was in the reign of William the fourth reduced into several statutes repealing all former provisions, and forming a new code upon the subject. But these statutes were themselves afterwards repealed, and the laws relating to the customs again consolidated (*s*). The enactments at present in force will be found chiefly in the 16 & 17 Vict. c. 107 (*t*),—called “The Customs Consolidation Act, 1853;”—the 18 & 19 Vict. c. 96 (*u*),—called “The Supplemental Customs Consolidation Act, 1855;”—the 18 & 19 Vict. c. 97,—called “The Customs Tariff Act, 1855” (*x*);—the 23 Vict. c. 22,—called “The Customs Tariff Amendment Act, 1860;”—the 30 & 31 Vict. c. 82,—called “The Customs Amendment Act, 1867” (*y*);—the 33 & 34 Vict. c. 32,—called “The Customs and Inland Revenue Act, 1870,” Part I.;—the 35 & 36 Vict. c. 20,—called “The Customs and Revenue Act, 1872;”—and the 36 Vict. c. 18,—called “The Customs and Inland Revenue Act, 1873.”

By the customs established by these Acts we under-

(*s*) This repeal was mainly by 8 & 9 Vict. c. 84. The Act of 3 & 4 Will. 4, c. 101, was repealed by 22 & 23 Vict. c. 37, s. 1.

(*t*) As to this Act, see 18 & 19 Vict. c. 96, s. 45 and sched. By the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63, s. 2 and sched.), certain of its provisions are repealed, viz. the last proviso in sect. 74, and sects. 170, 171, and 172.

(*u*) By the schedule to this Act, the 17 & 18 Vict. c. 122, for amendment of the laws and duties of the customs, is repealed.

(*x*) By sect. 8 of this Act, the 16 & 17 Vict. c. 106, called “The Customs

Tariff Act, 1853,” is repealed. As to the customs, see also 8 & 9 Vict. c. 85, ss. 2, 3; c. 86, ss. 45, 139, 140; c. 87, ss. 10, 124; 12 & 13 Vict. c. 90, ss. 41, 42, 43; 15 & 16 Vict. c. 47; 19 & 20 Vict. c. 75 (s. 8 of this Act. is repealed by 25 & 26 Vict. c. 63, s. 2 and sched.); c. 83, s. 5; 20 & 21 Vict. c. 62; 22 & 23 Vict. c. 37; 23 & 24 Vict. cc. 36, 110; 25 & 26 Vict. cc. 22, 63; 27 & 28 Vict. c. 18; 28 & 29 Vict. c. 30, s. 30; 29 Vict. c. 36; 30 Vict. c. 23.

(*y*) The new tariff under this Act is the result of the treaty with France, as regards the import trade.

stand duties directed to be paid by the merchant at the quay, upon certain imported and exported commodities. It is obvious that, though immediately paid by the merchant, such charges, by increasing the price of the articles, must fall ultimately on the consumer. [And yet these are the duties felt least by the public, and, if prudently managed, the people hardly consider that they pay them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really pays them, confounds them with the price of the commodity (z). But, on the other hand, these imposts, if too heavy, become a check and cramp upon trade: and especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed. This, in consequence, gives rise also to smuggling, which then becomes a very lucrative employment: and its natural and most reasonable punishment, viz. confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty.

There is also another ill consequence which attends high imposts on merchandize; that the earlier any tax is laid on a commodity, the heavier it falls upon the consumer in the end; for every trader through whose hands it passes must have a profit, not only upon the raw material and his own labour and time in preparing it, but also upon the very tax itself which he advances to government; otherwise he loses the use and interest of the money which he so advances.] But the inconve-

(z) Thus (says Blackstone, vol. i. p. 317) the Emperor Nero gained the reputation of abolishing the tax on the sale of slaves, though he only transferred it from the buyer to the seller: "so that it was, as Tacitus

"expresses it (Ann. l. 13, c. 31),
" remissum magis specie, quam re:
" quia cum venditor pendere ju-
" beretur, in partem pretii emp-
" toribus accrescebat."

nience here pointed at, is obviated to a certain extent under our present system of duties; for by the *warehousing regulations* (of which those at present in force are contained in 16 & 17 Vict. c. 107, ss. 85—100, and 32 & 33 Vict. c. 103,) the importer is now enabled to bring his goods into this country, without being obliged to pay the duties until he finds for his venture either a foreign or a home purchaser (*a*). This improvement, (great and obvious as it is,) was not introduced till the year 1803.

III. The excise is properly a duty upon certain commodities, charged, in most cases, on the manufacturer. The frauds that might be here committed unless a strict watch is kept, make it necessary to give the officers of revenue a power of entering and searching the places of business of such as deal in exciseable commodities, at any hour of the day; and (in presence of a constable) of the night likewise: and the proceedings, in case of transgressions, are of a summary kind, before the commissioners of revenue or justices of the peace; subject, however, (in either case,) to an appeal (*b*). This apparent rigour gives the tax itself a character that has been thought incompatible with the temper of a free nation. [For which reason, though Lord Clarendon tells us (*c*), that to his knowledge the Earl of Bedford (who was made lord treasurer by King Charles the first, to oblige his parliament,) intended to have set up the excise in England, yet it never made a part of that unfortunate prince's revenue; being first introduced, on the model of the Dutch prototype, by the parliament itself, after its rupture with the Crown. Yet such was the opinion of its general unpopularity, that when in 1642 “aspersions

(*a*) As to the appointment of warehousing places, see also 23 & 24 Vict. c. 36. As to the warehousing of British spirits, see 27 &

28 Vict. c. 12.

(*b*) Vide post, bk. VI. ch. XV.

(*c*) Hist. b. 3.

[“were cast by malignant persons upon the House of Commons, that they intended to introduce excises, the House for its vindication therein did declare, that these rumours were false and scandalous; and that their authors should be apprehended and brought to condign punishment” (*d*). However, its original establishment was in 1643, and the royalists at Oxford soon followed the example of their brethren at Westminster, by imposing a similar duty; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished (*e*). At first it was laid only on those commodities where it was supposed the hardship would be least perceivable, viz. beer, ale, cider and perry (*f*). But the parliament soon imposed it on flesh, wine, tobacco, sugar, and such a multitude of other commodities, that it might fairly be denominated general; in pursuance of the plan laid down by Mr. Pymme, (who seems to have been the father of the excise,) in his letter to Sir John Hotham, signifying, “that they had proceeded in the excise to many particulars, and intended to go on farther; but that it would be necessary to use the people to it by little and little” (*g*). And afterwards, when the nation had been accustomed to it for a series of years, the succeeding champions of liberty boldly and openly declared “the impost of excise to be the most easy and indifferent levy that could be laid upon the people” (*h*): and accordingly continued

(*d*) Com. Journ. 8th Oct. 1642.

(*e*) Lord Clar. b. 7.

(*f*) Com. Journ. 17th May, 1643.

(*g*) Ibid. 30th May, 1643; Dugdale of the Troubles, 120. According to the translator and continuator of Petavius's Chronological History (Lon. 1659, fol.), the excise was first moved for in the house of commons by Mr. *Prynne*, 28th March, 1643; but Blackstone suggests (vol. i. p.

319), that, as Mr. *Prynne* was not a member of the house till 7th November, 1648, it is probably a mistake of the printer, for Mr. Pymme, who was intended for chancellor of the exchequer under the Earl of Bedford.

(*h*) Ord. 14th Aug. 1649, c. 50; Scobel, 72; Stat. 1656, c. 19; Scobel, 453.

[it during the whole usurpation. In the twelfth year of Charles the second, it having then been long established and its produce well known, some part of it was given to the Crown, by way of purchase (as was before observed) for the feudal tenures and other oppressive parts of the hereditary revenue; and since that period it has constantly formed part of our system of taxation.] And however odious its name formerly was to the people of England, it is now viewed with toleration; and it is allowed not only to be a convenient and effective species of impost, but to be attended with this collateral advantage, that the supervision of the revenue authorities tends to protect commodities subject to excise from fraudulent adulteration. Its advantages indeed are such that, under recent Acts of parliament, many imposts have been classed (probably for greater convenience in collection) under this head of duties, which are not properly in the nature of excise. Such is the case with regard to the licences which the law requires to be annually taken out by those who manufacture or deal in certain articles, or who follow certain employments (*i*); and also with regard to the licence which must be taken out by every person who keeps a dog (*k*), uses a gun (*l*), or deals in game (*m*). To this branch of the revenue,—which is under the management of the Commissioners of Inland Revenue (*n*),—have also been now assigned not only the duties payable in respect of the above licences, as well as the duties on stage and hackney

(*i*) See 27 & 28 Vict. c. 56, s. 6. Among these are appraisers, pawn-brokers, hawkers, pedlars and house agents. (*Ibid.*) And as to pedlars, see also 34 & 35 Vict. c. 96.

(*k*) 30 & 31 Vict. c. 5.

(*l*) 33 & 34 Vict. c. 57.

(*m*) 1 & 2 Will. 4, c. 32; 6 & 7 Will. 4, c. 65, s. 9.

(*n*) As to this Board, and as to proceedings by it, see 43 Geo. 3, c. 99; 5 & 6 Will. 4, c. 20; 9 & 10

Vict. c. 56; 12 Vict. c. 1; 24 & 25 Vict. c. 91, s. 46; 31 & 32 Vict. c. 124. As to *compounding* for these taxes, see 8 & 9 Vict. c. 36; 13 & 14 Vict. c. 96; 26 & 27 Vict. c. 33. It may be here remarked, that a person failing on demand to pay taxes may, *if there be no sufficient distress on his premises*, be committed to prison by two commissioners of taxes till payment be made. (See 43 Geo. 3, c. 99, s. 3; 32 & 33 Vict. c. 14, s. 30.)

carriages, on railway passengers, on racehorses, on wine licences and refreshment houses,—but also such as are known by the name of the *assessed taxes*, these last being duties assessed and charged upon persons in respect of houses they inhabit, and of certain articles by them used or kept (*o*). And such assessed taxes comprise the duties on male servants, carriages, horses and mules, and armorial bearings (*p*).

IV. [Another branch of the revenue is the post office, or duty for the carriage of letters. As we have traced the original of the excise to the parliament of 1643, so it is but justice to observe that this useful invention owes its first legislative establishment to the same assembly. It is true there existed postmasters in much earlier times: but their business was probably confined to the furnishing of post horses to persons who were desirous to travel expeditiously, and to the dispatching of extraordinary packets upon special occasions. King James the first originally erected a post office under the control of one Matthew De Quester or De L'Equester, for the conveyance of letters to and from foreign parts. In 1635, King Charles the first erected a letter office for England and Scotland, and settled certain

- (*o*) See 32 & 33 Vict. c. 14, s. 11; 33 & 34 Vict. c. 32, Part V. As to the excise, generally, see 7 & 8 Geo. 4, c. 53; 9 Geo. 4, c. 47; 1 & 2 Will. 4, c. 22; 2 Will. 4, c. 16; 4 & 5 Will. 4, c. 51; c. 76, ss. 9, 10; 7 Will. 4 & 1 Vict. c. 49; 3 & 4 Vict. c. 18; 4 & 5 Vict. c. 20; 5 & 6 Vict. cc. 25, 79, 93; 7 & 8 Vict. c. 51; 8 & 9 Vict. c. 15; 10 & 11 Vict. c. 42; 11 & 12 Vict. c. 121, ss. 9—11, 18, 28; 12 & 13 Vict. c. 1; 15 & 16 Vict. c. 61; 16 & 17 Vict. cc. 37, 127; 17 & 18 Vict. cc. 27, 30; 18 & 19 Vict. cc. 22, 38, 94; 19 & 20 Vict. cc. 34, 51, 82; 20 Vict. c. 16; 23 Vict. c. 27; 23 & 24 Vict. cc. 90, 113, 114, 129; 24 & 25 Vict. c. 91; 25 Vict. c. 22; 27 & 28 Vict. c. 9; 28 & 29 Vict. c. 66; c. 96, ss. 23—29; 30 & 31 Vict. c. 90, ss. 1—19; 33 & 34 Vict. c. 32, Part II.
- (*p*) As to assessed taxes, see 43 Geo. 3, cc. 99, 161; 48 Geo. 3, c. 141; 3 Geo. 4, c. 88; 4 & 5 Will. 4, c. 60; 3 Vict. c. 17; 5 & 6 Vict. cc. 37, 80; 6 & 7 Vict. c. 24; 7 & 8 Vict. c. 46; 14 & 15 Vict. c. 36; 16 & 17 Vict. c. 90, s. 8; 17 & 18 Vict. c. 1, s. 5; c. 85; 19 & 20 Vict. c. 80; 24 & 25 Vict. c. 91, ss. 45, 46; 30 & 31 Vict. c. 90, ss. 25, 26; 32 & 33 Vict. c. 14, Part V. and Sched. (E).

[rates of postage (*g*); but this extended only to a few of the principal roads, the times of carriage were uncertain, and the postmasters on each road were required to furnish the mail with horses at the rate of twopence halfpenny a mile. On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter office (*r*). And about that time the outline of a more extended and regular plan seems to have been conceived by Mr. Edmond Prideaux, who was appointed attorney-general to the commonwealth, after the death of King Charles. He was chairman of a committee of the House of Commons, in 1642, for considering what rates should be set upon inland letters (*s*); and was afterwards appointed postmaster by an ordinance of both the Houses (*t*), in the execution of which office he first established a weekly conveyance of letters into all parts of the nation (*u*); thereby saving to the public the charge of maintaining postmasters, to the amount of 7,000*l.* per annum. And, his own emoluments being probably very considerable, the common council of London endeavoured to erect another post-office in opposition to his, till checked by a resolution of the House of Commons, declaring that the office of postmaster is and ought to be in the sole power and disposal of the parliament (*v*). But in 1657 a regular post office was erected, by the authority of the Protector and his parliament, upon nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of Queen Anne (*x*). After the Restoration a similar office, with some improvements, was established by statute 12 Car. II. c. 35;] but the rates of

(*g*) 20 Rym. Fœd. 192, 630.

(*r*) Blackstone says (vol. i. p. 322) that at one time the office of postmaster was claimed by Lord Stanhope (Latch. 87), but was confirmed by Charles the first to one William Frizell, then to Thomas Witherings, and afterwards to Philip

Burlamachy. (20 Rym. Fœd. 429.)

(*s*) Com. Journ. 28th Mar. 1642.

(*t*) Ibid. 7th Sept. 1644.

(*u*) Ibid. 21st Mar. 1649.

(*v*) Ibid.

(*x*) Ibid. 9th June, 1657; Scobel, 511.

letters have been since altered, and further regulations added by many subsequent statutes (*y*).

It has been asserted that no more eligible method of raising money upon the subject can be devised than this tax, inasmuch as it affords to both the government and the people a mutual benefit; because the government acquire a revenue, and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax, (and of course no such office,) existed (*z*). Of late, however, the post office has been regarded less as a source of revenue, than as affording an easy, ready, and cheap transmission of correspondence,—for the convenience of the public and the promotion of the commercial interest of the country. Accordingly the postage has gradually since the year 1840 become reduced to an uniform rate, irrespective of distance, and amounting at present only to the sum of one penny for every letter conveyed between places in the United Kingdom, provided it does not exceed one ounce in weight (*a*). And in further development of the system, *books, newspapers* and *patterns* are now also conveyed by the post at even lower rates than letters, in proportion to the weight conveyed. Yet the produce arising from this branch of the revenue (which is under the management of the postmaster-general) appears to be steadily increasing (*b*).

(*y*) See the later Acts 7 Will. 4 & 1 Vict. cc. 33, 36; 1 & 2 Vict. cc. 97, 98; 2 & 3 Vict. c. 52; 3 & 4 Vict. c. 96; 10 & 11 Vict. c. 85; 11 & 12 Vict. c. 88; 23 & 24 Vict. c. 65; 33 & 34 Vict. c. 79 ("The Post Office Act, 1870"); and 34 Vict. c. 30. And as to colonial posts, see 7 & 8 Vict. c. 49.

(*z*) 1 Bl. Com. 323.

(*a*) By 3 & 4 Vict. c. 96, was abolished the privilege formerly exercised by all members of parliament, of *franking*, or sending and

receiving letters free of duty.

(*b*) It may be here remarked that the machinery of the Post Office is now also used in managing *savings banks* and providing small *insurances* and *annuities* with government securities (vide post, bk. iv. pt. III. ch. III). Moreover the *electric telegraphs* are now placed under the direction of the Post Office. (See 31 & 32 Vict. c. 110; 32 & 33 Vict. c. 73; 33 & 34 Vict. c. 88.)

V. A fifth branch of the revenue (also under the management of the commissioners of inland revenue) consists in the stamp duty, which is a tax imposed upon a great variety of legal and other documents (*c*); and in fact on almost all instruments between man and man which are written on parchment or paper; as also upon newspapers (*d*), cards and dice (*e*). This tax (which varies in its amount according to the nature of the thing stamped), though in some cases heavily felt, yet affords some compensatory advantage to the public, by authenticating instruments, and rendering it more difficult to forge deeds of any antiquity; since, as the officers of this branch of the revenue vary their stamps frequently, by marks known to none but themselves, a man that would forge a deed of antient date, must know and be able to counterfeit the stamp of that time (*f*). The first institution of the stamp duties was by statute 5 & 6 W. & M. c. 21 (*g*); but they have long since been increased vastly beyond the original design (*h*). And there are two duties classed by act of parliament under this branch of the revenue, (though of a different nature from the rest,) which are of such importance as to deserve a particular mention, viz., that payable under the Legacy Duty Acts (*i*),

(*c*) See 28 & 29 Vict. c. 45, as to *court fees*; 32 & 33 Vict. c. 49, as to *finés and fees* to local authorities.

(*d*) See 13 & 14 Vict. c. 97.

(*e*) See 25 Vict. c. 22, ss. 27—37.

(*f*) 1 Bl. Com. 324.

(*g*) Bl. Com. ubi sup.

(*h*) The principal Stamp Acts are the 55 Geo. 3, c. 184, and the Stamp Act, 1870 (33 & 34 Vict. c. 97). See also the following statutes containing enactments on this subject: 11 Geo. 4 & 1 Will. 4, c. 43; 1 & 2 Will. 4, c. 22; 2 & 3 Will. 4, c. 120; 5 & 6 Will. 4, c. 20; 18 & 19

Vict. c. 36; 19 & 20 Vict. c. 27; 21 & 22 Vict. c. 11; 28 & 29 Vict. c. 45; 30 & 31 Vict. c. 90, ss. 20—24; 33 & 34 Vict. c. 32, Part III. c. 98; 34 & 35 Vict. c. 4.

(*i*) See 36 Geo. 3, c. 52; 45 Geo. 3, c. 28; 55 Geo. 3, c. 184, sched.; 8 & 9 Vict. c. 76, s. 4; 13 & 14 Vict. c. 97. Duty is chargeable both on legacies, and on the residue of the personal estate of a person deceased. But the husband or wife of the deceased is exempt from the duty, and so also are the royal family. Where the legacy or

and that payable under “The Succession Duty Act, 1853” (*i*).

VI. [The last branch of revenue to be here noticed, is the duty upon offices and pensions, which consists in an

residue, or part of the residue, accrues to a child or descendant of a child,—or the father or mother, or any lineal ancestor,—of the deceased, the duty is 1*l*. per cent. If to a brother or sister, or any descendant of a brother or sister, 3*l*. per cent. If to a brother or sister of the father or mother of the deceased, or any descendant of such brother or sister, 5*l*. per cent. If to a brother or sister of a grandfather or grandmother of the deceased, or any descendant of such brother or sister, 6*l*. per cent. And if to any person in any other degree of collateral consanguinity to the deceased, (or to any stranger in blood,) 10*l*. per cent. As to summary proceedings in the Court of Exchequer to enforce payment of legacy, or succession or probate duties, see 28 & 29 Vict. c. 104, ss. 55—57.

(*i*) 16 & 17 Vict. c. 51. This Act imposes a succession duty on all beneficial interest in property, real or personal, accruing to any party upon any death which shall have taken place after 19th May, 1853; and on every increase of benefit accruing to any person after that day, by the determination of any charge on real or personal property where such charge is determinable only by reference to death. The rate of this duty varies according to the degree of consanguinity, or the absence of consanguinity, between the party be-

coming beneficially entitled and the party from whom the interest is derived; and varies according to the same scale as set forth in the last note with respect to legacy duty. But it is to be understood that the duty under this Act is not in any case chargeable in *addition* to that under the Legacy Duty Acts; it being provided, that no person charged with the duty under those Acts in respect of any property subject to such duty, shall be charged also with the duty granted by the Act now in question in respect of the same acquisition of the same property (sect. 18). Where the succession duty has become payable, notice must be given of it, within such period as the Act directs, to the Commissioners of Inland Revenue, under a heavy penalty in case of neglect; and a like penalty will be payable every month during which the neglect continues (sect. 44—46). On the construction of this Act, (with which are incorporated 36 Geo. 3, c. 52, ss. 10—12, 14, 23,) see the Att.-Gen. *v.* Hallett, 2 H. & N. 368; the Same *v.* Lord Middleton, 3 H. & N. 125; the Same *v.* Sibthorpe, *ib.* 424; In re Elwes, *ib.* 719; Att.-Gen. *v.* Baker, 4 H. & N. 19; the Same *v.* Braybrooke, 5 H. & N. 488; the Att.-Gen. *v.* Upton, Law Rep., 1 Exch. 224; Wallace *v.* Att.-Gen., *ib.* 1 Ch. App. 1.

[annual payment, over and above all other duties, charged on all salaries, fees, perquisites of offices and pensions payable by the Crown, which exceed the value of 100*l.* per annum. This was first imposed by statute 31 Geo. II. c. 22, for a limited period;] and, after having been from time to time continued, was made perpetual by 49 Geo. III. c. 32 (*h*).

VII. The taxes of which notice has now been taken are all (as we have before remarked) which are permanently fixed upon the subjects of this realm. But in the year 1842, the revenue being then insufficient to meet the public expenditure, it was thought proper to revive with some modifications a tax which had been levied on former occasions of emergency, for a limited period, viz. an *income tax* (*l*). Accordingly, by 5 & 6 Vict. c. 35, this tax was re-imposed, in the first instance for a term of three years only, on the yearly profits arising from property, professions, trades and offices. But at the expiration of that term, and since by frequent renewals up to the present time, the existence of the tax has been prolonged, though the rate in the pound has been the subject of variations in the successive Acts by which the tax itself has been continued (*m*).

All of the above taxes are levied (as before in part

(*h*) As to this duty, see also 2 & 3 Vict. c. 94.

(*l*) The *Income* (sometimes called *Property*) tax was first introduced in 1798,—abolished in 1802,—revived in 1803,—and again abolished in 1816. (McCulloch's Statistical Account of the British Empire, vol. ii. pp. 514, 515.)

(*m*) As to the income tax, see 5 & 6 Vict. c. 35; 6 & 7 Vict. c. 24, s. 7; 14 & 15 Vict. c. 12; 16 & 17 Vict. cc. 31, 91; 17 & 18 Vict. c. 85;

18 & 19 Vict. c. 35; 19 & 20 Vict. c. 80; 22 & 23 Vict. c. 18; 23 Vict. c. 14; 24 & 25 Vict. c. 91, ss. 36, 37, 38, 45, 46; 25 Vict. c. 22, ss. 42—45; 27 & 28 Vict. c. 18, s. 15, sched. D.; 30 Vict. c. 23, sched. C.; 32 & 33 Vict. c. 14, Part II.; 33 Vict. c. 4; 33 & 34 Vict. c. 32, Part IV.; 34 Vict. cc. 5, 21; 35 & 36 Vict. c. 82; 36 Vict. c. 8. As to the principle on which the tax is assessed, see *Udney v. The Hon. East India Company*, 13 C. B. 733.

explained) to discharge the expenses which are annually incurred by the government, in respect of the public service (including therein the maintenance of the royal dignity); and a very large proportion of these expenses consists in payments made on account of the interest of the *national debt*,—a subject of which it is proper therefore to take some notice in this place.

The national debt is in part *funded* and in part *unfunded*; the former being that which is secured to the national creditor upon the public funds, (the nature of which will be presently explained,) the latter, that which is not so provided for. The unfunded debt is comparatively but of small amount, and is generally secured by *exchequer bills and bonds*, which are instruments issued by the exchequer, under the authority (for the most part) of Acts of Parliament passed for the purpose; and containing an engagement, on the part of the government (*n*), for the repayment of the principal sums advanced, with interest in the mean time (*o*). But of the funded debt, a more particular account may here be acceptable.

[In order to take a clear and comprehensive view of the nature of this part of the national debt, it must be premised, that after the Revolution, when our new connexions with Europe introduced a new system of foreign politics, the expenses of the nation,—not only in settling the new establishment, but in maintaining long wars on the continent for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the House of Austria, maintaining the liberties of the Germanic body, and other purposes,—increased to

(*n*) Where exchequer bills are issued under the authority of Parliament, they are charged upon and paid out of the *consolidated fund*. (See 29 Vict. c. 25.)

(*o*) As to exchequer bills and bonds, see 57 Geo. 3, c. 48; 59 Geo. 3, c. 19; 6 & 7 Vict. c. 1; 14 & 15 Vict. c. 9; 15 & 16 Vict. c. 10; 17 & 18 Vict. c. 23; 19 & 20 Vict. c. 105, s. 2; 29 Vict. c. 25.

[an unusual degree; insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of those times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the State, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed: by this means converting the principal debt into a new species of property, transferable from one man to another at any time and in any quantity. A system which seems to have had its original in the state of Florence, A.D. 1344; which government then owed about 60,000*l.* sterling; and, being unable to pay it, formed the principal into an aggregate sum, called metaphorically a mount or bank, the shares whereof were transferable like our stocks, with interest at five per cent., the prices varying according to the exigencies of the state (*p*).] This policy of the English parliament laid the foundation of what is called the national debt, (for a few long annuities created in the reign of Charles the second will hardly deserve that name): and the example then set has been so closely followed in more modern times, and particularly during the wars in the reign of Queen Anne, and afterwards with the revolted provinces of America and with revolutionary France, that the capital of the unredeemed funded debt of Great Britain and Ireland amounted, on the 31st March, 1873, to 726,584,423*l.* 11*s.* 2*d.*, independently of an outstanding unfunded debt to the extent of 4,829,100*l.* more (*q*).

The form of the security held by the public creditors, in respect of the funded debt, is that of annuities granted by parliament to those who originally advanced the money,

(*p*) “*Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augetur.*” — Aretin. See Mod. Un. Hist. xxxvi. 116.

(*q*) See the Finance Accounts for the year ending 31st March, 1873, (pp 61, 64.)

and granted for the most part in perpetuity, affording a certain rate of interest for ever upon the principal sum due. To the payment of these annuities the public faith is pledged; but the annuitants have no right to call for payment of the principal; while on the other hand the public has, in general, a right to insist on making that payment, whenever it shall be in a condition to do so,—and thereby redeeming the annuities. These annuities are denominated the *public funds*: and are not only transferable by the holder, but pass by law to his representatives; and are subject, indeed, in every material particular, to all the incidents ordinarily attaching to other personal property (*t*).

The liability thus fastened upon the present generation, to discharge the interest of a public debt, the bulk of which was contracted before they came into existence, may at first sight carry the air of hardship; but there can be no reasonable doubt of the right of our ancestors to impose the burthen. The loans out of which the debt principally arose, were incurred in the support of wars which they deemed necessary for the maintenance of the public freedom, honour, or prosperity—objects of a lasting and descendible kind, in which their successors were not less interested than themselves. The supplies required for the purpose were too large to have been defrayed in their own times; nor would it have been just that they alone should struggle under the burthen, when their descendants were to share the benefit. Though the necessity for engaging in these

(*t*) Property in the “public funds,” (as to which term, see *Grainger v. Slingsby*, 25 L. J., Ch. 573,) was not formerly subject to execution for debt; but it may now be charged for that purpose by order of a judge. (1 & 2 Vict. c. 110, s. 14.) As to the repeal of the Acts formerly in force against stock-jobbing in the public funds, see 23 Vict.

c. 28. In the National Debt Act, 1870, (33 & 34 Vict. c. 71,) there are a variety of enactments relating to the national debt; chiefly in reference to the payment of dividends, to unclaimed dividends, and to the issue to stock-holders of stock certificates with coupons annexed made payable to the *bearer*.

wars should now appear to be in any instance questionable, the argument remains unaltered. In the nature of things, the existing race can be the only judges of the necessity of a war; and it is in the order of Providence, that in this (as in other particulars) the interests of unborn generations shall be confided to the management of their predecessors.

The funding system, while thus unimpeachable in point of natural justice, is on the other hand attended in some respects with considerable advantage to the public. It affords a ready, safe and easily convertible species of investment for capital that would otherwise lie unproductive, or be laid out in securities of a more troublesome and hazardous kind. It is also so far a source of strength to the country, that it gives that numerous class of individuals who constitute the fundholders, and whose dividends depend upon the produce of the taxes, a direct interest in the stability of the national institutions, and the preservation of the public welfare.

It cannot, however, be denied, that these taxes, in their more direct operation, tend to impair the productive ability of the industrious classes; and that the amount of them required to discharge the interest of the enormous debt for which the nation is now liable, weighs heavily upon the country, and darkens our prospect for the future (*u*). The more immediate alarm, indeed, which it is calculated to excite, is perhaps for the safety of the public creditor. For it is obvious, that the capital invested in the funds exists, (like any other debt,) in name and in paper only; and that its value depends entirely upon the degree of reliance that can be placed in the good faith and resources of the government. But if the confidence of the fundholder

(*u*) At the period when Blackstone wrote, the capital of the national debt, funded and unfunded, was only 136,000,000*l*. Yet he says (vol. i. p. 328), “The enormous

“taxes that are raised upon the
“necessaries of life, for the payment
“of the interest of this debt, are a
“hurt both to trade and manufac-
“tures, &c.”

should in either of these points be deceived, (a danger that manifestly increases as the debt increases,) the ruin in which so large a class of the community would inevitably be involved, and the irreparable shock to public credit, might have general and national results of a nature too painful to be steadily contemplated.

[To return to the subject of the taxes: it is to be observed, that the respective produces of customs, excise, stamps, and several other taxes, were originally separate and distinct funds; being securities for the sums advanced on each several tax, and for them only. But at last it became necessary, in order to avoid confusion, to reduce the number of these separate funds by uniting and blending them together. There were formerly three capital funds in existence, which had been thus produced by the aggregation of several component parts: the *aggregate* fund, the *general* fund, (so called from such union and addition,) and the *South Sea* fund,—the last being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by the South Sea Company and its annuitants.] But in the year 1787 the public accounts were again newly arranged, by abolishing these divisions and including the whole in one, called the *consolidated fund* (*x*); which has been since combined with that of Ireland, and forms with it the *Consolidated Fund of the United Kingdom* (*y*).

The consolidated fund now comprises the produce of all the taxes which have been enumerated, added to some small receipts from the royal hereditary revenue (surrendered, as before explained, to the public use), and from other sources (*z*); and it constitutes almost the whole of the ordinary public income of the United Kingdom of Great Britain and Ireland; which income amounted for the year

(*x*) See 27 Geo. 3, c. 13.

(*y*) See 56 Geo. 3, c. 98; 19 & 20 Vict. c. 59.

(*z*) See, for example, 31 Vict. c.

9, as to casual receipts by persons holding public offices.

ending 31st March, 1873, to 76,608,770*l.* 5*s.* 1*d.* (*a*). The consolidated fund is pledged for the payment of the whole of the interest of the national debt of Great Britain and Ireland (*b*); and, besides this, is liable to several other specific charges imposed upon it at various periods by act of parliament,—such as the *civil list* and the salaries of the judges and ambassadors and some other official persons (*c*); after payment of which, the surplus is to be indiscriminately applied to the service of the united kingdom under the direction of parliament (*d*). Of the *civil list* it will be proper here to give some further explanation.

This is an annual sum granted by parliament at the commencement of each reign, for the expense of the royal household and establishment, as distinguished from the general exigencies of the State; and is the provision before stated to be made for the crown, out of the taxes, in lieu of its proper patrimony, and in consideration of the assignment of that patrimony to the public use. This arrangement has prevailed from the time of the Revolu-

(*a*) Finance accounts for the year ending 31st March, 1873, p. 10.

(*b*) 56 Geo. 3, c. 98. See also 2 & 3 Will. 4, c. 116; 19 & 20 Vict. c. 108.

(*c*) See 19 & 20 Vict. c. 108, s. 80, as to the salaries of the judges of *county courts* being charged out of the consolidated fund.

(*d*) See for example 35 & 36 Vict. c. 1. By 17 & 18 Vict. c. 94, in order to bring the national income and expenditure under the more immediate view and control of parliament, certain payments and salaries formerly charged on the consolidated fund, were directed, for the future, to be paid out of supplies from time to time provided and appropriated by parliament for the purpose. Of such an Act, the 35 & 36 Vict. c. 87, is an example.

It may be here noticed that, out of the consolidated fund, advances of money for public works and fisheries, for employment of the poor, and for other purposes, are from time to time authorized by Act of Parliament. Of such an Act the 24 & 25 Vict. c. 80 (amended by 25 & 26 Vict. c. 30), is an example. It may be further observed that by the 56 Geo. 3, c. 98 (above cited), the consolidated fund is also primarily charged with the payment of the interest on the *sinking funds* applicable to the reduction of the national debt. At different periods of our financial history, different principles have been pursued as to the manner in which such a fund should be formed. (See 32 Geo. 3, c. 69; 10 Geo. 4, c. 27; 3 & 4 Will. 4, c. 24; 21 & 22 Vict. c. 38; 29 & 30 Vict. c. 11.)

tion downwards, though the amount fixed for the civil list has been subject in different reigns to considerable variation. At the commencement of the present reign a civil list was settled on her majesty for life to the amount of 385,000*l.* per annum, payable quarterly, out of the consolidated fund; of which the sum of 60,000*l.* is assigned for her majesty's privy purse, and the remainder is applicable chiefly to the salaries and expenses connected with her household (*e*). In return for which grant it was at the same time provided, that the hereditary revenues of the Crown (with the exception of the duties of excise on beer, ale, and cider, which were to be discontinued during the present reign) should, during the present queen's life, be carried to, and form part of the consolidated fund (*f*). The civil list (as will sufficiently appear from these explanations) is therefore granted by the public in exchange for the whole of that part of the consolidated fund which is the produce of the revenue of the sovereign in his own distinct capacity; the remainder of that fund being rather the revenue of the public or its creditors, though collected and distributed again in the name and by the officers of the Crown (*g*). The civil list, therefore, now stands in the same place as the hereditary income did formerly; but with this great difference, that it is not chargeable, as the hereditary income was, with the general and public expenses of government (*h*). [The whole revenue of Queen Elizabeth amounted to 600,000*l.* a year (*i*); that of King Charles the first was 800,000*l.* (*k*); and the revenue voted for King Charles the second was 1,200,000*l.* (*l*); though complaints were made (in the first years at least) that it did not amount to so much (*m*). But it must be observed, that under these sums were included all manner

(*e*) The Act for this purpose is 1 & 2 Vict. c. 2.

(*f*) Ibid. As to the revenue derived from *wreck*, vide sup. p. 545.

(*g*) 1 Bl. Com. 332, 333.

(*h*) Bl. Com. ubi sup.

(*i*) Lord Clar. Continuation, 163.

(*k*) Com. Journ. 4th September, 1660.

(*l*) Ibid. 14th September, 1660.

(*m*) Ibid. 4th June, 1663; Lord Clar. Continuation, 165.

[of public expenses; among which Lord Clarendon in his speech to the parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.*, which was ten times more than before the former troubles (*n*). The same revenue, subject to the same charges, was settled on King James the second (*o*); but, by the increase of trade and more frugal management, it amounted on an average to a million and a half per annum—besides other additional customs granted by parliament, which produced an annual revenue of 400,000*l.* (*p*),—out of which his fleet and army were maintained at the yearly expense of 1,100,000*l.* (*q*).

Upon the whole, it is doubtless much better for the Crown, and also for the people, to have the revenue settled upon the modern footing rather than the antient: for the Crown, because it is more certain, and collected with greater ease; for the people, because they are now delivered from the feudal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet if we consider the sums that have been formerly granted, the limited extent under which it is now established, the revenues and prerogatives given up in lieu of it by the Crown, and, above all, the diminution of the value of money, compared with what it was worth in former reigns,—we must acknowledge these complaints to be void of any rational foundation: and that it is impossible to support that dignity, which a sovereign of this country should maintain, with an income in any degree less than what is now established by parliament.]

(*n*) Lord Clar. Continuation, 165.

(*o*) 1 Jac. 2, c. 1.

(*p*) Chaps. 3, 4.

(*q*) Com. Journ. 1st Mar. and 20th Mar. 1688.

CHAPTER VIII.

OF THE ROYAL FORCES.

It will be recollected that, in a former place, when considering that branch of the royal prerogative which relates to the right of military command, we postponed the discussion of the manner in which the royal forces were raised and regulated (*a*). To this subject, after some preliminary remarks on the history of our military system, we now propose to devote the present chapter.

[In the time of our Saxon ancestors, as appears from Edward the Confessor's laws (*b*), the military force of this kingdom was in the hands of the dukes (or heretochs), who were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were most remarkable for being *sapientes, fideles, et animosi*." Their duty was to lead and regulate the English armies, with a very unlimited power; "*prout eis visum fuerit ad honorem coronæ et utilitatem regni*." And because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was entrusted with such power as if abused might tend to the oppression of the people, that power should be delegated to him by the vote of the people themselves (*c*).

(*a*) Vide sup. p. 498.

(*b*) Wilkins, Leg. Anglo-Sax. Ll. Edw. Confess. C. *De Heretochiis*.

(*c*) "*Isti vero viri eligebantur per commune consilium, pro com-*

muni utilitate regni, per provincias et patrias universas, et per singulos comitatus, in pleno folkmote, sicut et vicecomites, provinciarum et comitatum, eligi de-

[So, too, the antient Germans, the ancestors of our Saxon forefathers, had their dukes, as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus, "*reges ex nobilitate, duces ex virtute sumunt*" (d). In constituting their kings, the family or blood royal was regarded; in choosing their dukes or leaders, warlike merit: just as Cæsar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defence, they elected leaders to command them (e). This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown: and accordingly we find a very ill use made of it by Edric Duke of Mercia, in the reign of King Edmund Ironside; who, by his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

It seems universally agreed by all historians, that King Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers; but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation; though, from what was last observed, the dukes seem to have been left in the possession of too large and independent a power: which enabled Duke Harold, on the death of Edward the Confessor, though a stranger to the royal blood, to mount for a short space the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir.

bent."—Il. Edw. Confess. ubi sup.
See also Bede, Eccl. Hist. l. 5, c.
10.

(d) De Morib. Germ. 7.

(e) "*Quum bellum civitas aut*

illatum defendit, aut infert, magistratus qui ei bello præsint, deliguntur."—De Bell. Gall. l. 6, c. 22.

[Upon the Norman conquest the feudal law was introduced here in all its rigour, the whole of which is built on a military plan. The particulars of that constitution have been already explained (*f*). It is sufficient here to observe, that, in consequence thereof, all the land in the kingdom held by tenure in chivalry was divided into what were called knights' fees, in number above sixty thousand; and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars for forty days in a year (*g*); in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious. By these means the king had, without any expense, an army of sixty thousand men always ready at his command. And accordingly we find among the laws of William the Conqueror (*h*), one which in the king's name commands and firmly enjoins the personal attendance of all knights and others; "*quod habeant et teneant se semper bene in armis et in equis, ut deceat et oportet: et quod sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum opus adfuerit, secundum quod debent de feodis et tenementis suis de jure nobis facere.*" This personal service in process of time degenerated into pecuniary commutations or aids; and at last the tenure in chivalry itself was abolished at the Restoration, by statute 12 Car. II. c. 24.

In the meantime we are not to imagine that the kingdom was left wholly without defence in case of domestic insurrections, or the prospect of foreign invasions. Besides those who, by their military tenures, were bound to perform forty days' service in the field, first the assize of arms, enacted 27 Hen. II. (*i*), and afterwards the statute

(*f*) Vide sup. vol. I. pp. 172 et seq.

(*g*) We frequently read of *half* or other aliquot part of a knight; (as that for so much land three knights and a half, &c., were to be returned). The fraction of a knight was per-

formed by a whole knight, who served half the time, or other due proportion of it. (Christian's Blackstone.)

(*h*) C. 58. See Co. Litt. 75, 76.

(*i*) Hoved. A.D. 1181.

[of Winchester(*k*), under Edward the first, obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace; and constables were appointed in all hundreds by the latter statute, to see that such arms were provided. These weapons were changed by the statute 4 & 5 Phil. & M. c. 2, into others of more modern service; but both this and the former provisions were repealed in the reign of James the first(*l*). While these continued in force, it was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide, to muster and array (or set in military order) the inhabitants of every district; and the form of the commission of array was settled in parliament in the fifth year of Henry the fourth, so as to prevent the insertion therein of any new penal clauses(*m*). But it was then also provided, that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of parliament(*n*). About the reign of King Henry the eighth, or his children, *lieutenants* of counties began to be introduced, as standing representatives of the Crown, to keep them in military order(*o*); for we find them mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3. But they had not been then long in use, for Camden speaks of them(*p*), in the time of Queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger(*q*). The introduction of these commissions of lieutenancy, which contained in substance the same powers as the

(*k*) 13 Edw. 1, c. 6.

(*l*) 1 Jac. 1, c. 25; 21 Jac. 1, c. 28.

(*m*) See Rushworth, part iii. pp. 662, 667; 8 Rym. 374, &c.

(*n*) 1 Edw. 3, st. 2, cc. 5, 7; 25 Edw. 3, st. 5, c. 8.

(*o*) See 15 Rym. 75.

(*p*) Brit. 103, edit. 1594.

(*q*) The office of lord lieutenant was first created in the third year of Edward the sixth, in consequence of the many disturbances in several counties, by the followers of the old religion against the new establishment. (Coleridge's Blackstone.)

[old commissions of array, caused the latter to fall into disuse.

In this state things continued, till the repeal of the statutes of armour, in the reign of King James the first: after which, when King Charles the first had, during his northern expedition, issued commissions of lieutenancy and exerted some military powers (which, having been long exercised, were thought to belong to the Crown,) it became a question in the Long Parliament, how far the power of the militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament; the two houses not only denying this prerogative of the Crown, but also seizing into their own hands the entire power of the militia (*r*).

Soon after the restoration of King Charles the second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the Crown to govern and command them, and to put the whole into a more regular method of military subordination.] And the order in which the militia now stands by law, is principally built upon the statutes which were then enacted—viz. 13 Car. II. st. 1, c. 6; 13 & 14 Car. II. c. 3; and 15 Car. II. c. 4. It is true these have been repealed; but many of their provisions are re-enacted, with the addition of some new regulations, by subsequent militia laws (*s*). The present

(*r*) Blackstone, (vol. i. p. 412,) observes on this head, that “the legality of this prerogative might perhaps be somewhat doubtful.” The statute, however, of 13 Car. 2, c. 6, shows that the supreme command of all the militia of the realm is, and ever was, the undoubted

right of the sovereign. Vide sup. p. 499. (And see 34 & 35 Vict. c. 86, Part II.)

(*s*) Blackstone (*ubi sup.*) says, that the two last of the statutes of Charles mentioned in the text “are apparently repealed.” However, the first, and the greater part of the two

system may be said to be founded upon the “General Militia Act” (42 Geo. III. c. 90), which consolidates the former statutes upon this subject(*t*); and the general scheme is to train, at stated periods of the year(*u*), for the internal defence of the country, a certain number of the inhabitants of every county; such troops being enlisted for a period not exceeding six years, and being officered by gentlemen commissioned by the Crown for that purpose(*x*).

The militia is raised, in default of voluntary enlistment, by compulsory levy in the way of ballot—to which power it has not latterly been found necessary to have recourse(*y*); and, on the other hand, is entitled to pay while on service and during the period of training(*z*). But besides the *militia* we are to take into account our unpaid yeomanry and volunteers; a description of force which originated in the menace of French invasion in the reign of King George the third(*a*). The yeomanry cavalry still exists, and though the other volunteers then raised were laid aside after that emergency ceased, their place is now supplied by volunteers of a different and

last, are expressly repealed by 26 & 27 Vict. c. 125.

(*t*) The reader is also referred to the following Militia Acts, passed since the 42 Geo. 3, c. 90, viz.:—51 Geo. 3, c. 118; 15 & 16 Vict. c. 50; 17 & 18 Vict. cc. 13, 105; 18 & 19 Vict. cc. 1, 57; 22 & 23 Vict. c. 38; 23 & 24 Vict. cc. 94, 120; 26 & 27 Vict. c. 65; 30 & 31 Vict. c. 111; 31 & 32 Vict. c. 76; 32 Vict. c. 13; 32 & 33 Vict. c. 66; 33 & 34 Vict. c. 68; 34 & 35 Vict. c. 86, Part II.; 36 & 37 Vict. cc. 68, 75, 84.

(*u*) See 34 & 35 Vict. c. 86, s. 8. Although thus periodically called together for the purpose of being trained, the militia can only be *drawn out and embodied* in case of imminent national danger or

great emergency, the occasion being first communicated to parliament, if sitting, or, if not sitting, proclaimed by order in council. (33 & 34 Vict. c. 68.)

(*x*) The subaltern officers are appointed on the recommendation of the lord lieutenant of the county. (34 & 35 Vict. c. 86, s. 6.) No *property* qualification is now (as formerly) required in the case of militia appointments. (32 Vict. c. 13, s. 3.)

(*y*) See 10 Geo. 4, c. 10; 28 & 29 Vict. c. 46; 36 & 37 Vict. c. 75.

(*z*) See 30 & 31 Vict. c. 92.

(*a*) The principal Act relating to the volunteers raised in the reign of Geo. 3, was the 44 Geo. 3, c. 54, now repealed by 26 & 27 Vict. c. 65.

more modern description, viz. the Volunteer Rifle and Artillery Corps (*c*),—by which, within a few years past, our defensive military force has been immensely increased (*d*); and the necessity for which has been almost universally felt, in consequence of the very large and constant additions made to the armaments of the continental powers (*e*).

The occasions of war, however, require soldiers more completely and permanently disciplined than those of our modern militia or volunteers; and our military establishment consequently comprises, besides these, a large body of regular and paid forces, who are raised by voluntary enlistment (*f*) Our constitution indeed looks with jealousy upon levies of this description. [And whereas after the Restoration, King Charles the second kept up about five thousand regular troops, by his own authority, for guards and garrisons—which King James the second by degrees increased to no less than thirty thousand, all paid from his own civil list—it was made one of the articles of the Bill of Rights, that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law (*g*).

(*c*) By 26 & 27 Vict. c. 65 (amended by 32 & 33 Vict. c. 81), the previous Acts relating to the volunteer force in Great Britain are consolidated, and their enactments amended.

(*d*) It appears from the Report of a Royal Commission issued in 1862, that on the 1st April of that year, this unpaid army consisted of 24,363 artillery, 2,904 engineers, 662 light horse, 650 mounted rifles, and 134,096 rifles—making a total of 162,681 men.

(*e*) Notice was issued from the War Office, dated 12th May, 1859, that government,—having had under consideration the propriety of per-

mitting the formation of volunteer rifle corps under the provisions of the Act 44 Geo. 3, c. 54, as well as of artillery corps and companies in maritime towns in which there may be forts and batteries, - were prepared to receive, through the lords lieutenants of counties, any proposals with that object. To this invitation numerous answers were promptly returned.

(*f*) On being enlisted, each recruit takes an oath of allegiance to the Queen. (See 31 & 32 Vict. c. 72, Part 3.)

(*g*) Stat. I W. & M. st. 2, c. 2. Vide sup. p. 471.

[But, as the fashion of keeping standing armies,—which was first introduced by Charles the seventh in France, in the year 1445 (*h*),—came afterwards to prevail universally over Europe, it has also for many years past been annually judged necessary by our legislature (for the safety of the kingdom, the defence of the realm, and the preservation of the balance of power in Europe) to maintain, even in time of peace, a standing body of troops, under the command of the Crown (*i*).] An Act of Parliament, therefore, passes annually, (whether in peace or war,) authorizing the maintenance of the regular forces deemed necessary for the service of the state (*h*); who are, however, *ipso facto* disbanded at the expiration of every year, unless continued by parliament.

By this annual Mutiny Act (for so it is called), provision is also made for the manner in which the troops are to be enlisted (*l*), paid and “billeted,” that is, dispersed among the several innkeepers and victuallers throughout the kingdom] (*m*). And regulations are besides laid down therein for the government of the army. By these,

(*h*) See Robertson, Hist. of Cha. V. i. 24.

(*i*) See Lord Macaulay's Hist. vol. 5, p. 1 et seq.

(*k*) The paid forces, now authorized, consist of 128,968 men, exclusive of the *Indian* force. (36 Vict. c. 10.) It may be noticed that by 18 & 19 Vict. c. 2, her Majesty was enabled, during the continuance of the then existing war against Russia, to enlist *foreigners*, as officers and soldiers in her army. By 22 & 23 Vict. c. 40, provision is made for the establishment of a *reserve force* of seamen volunteers; by 24 & 25 Vict. c. 74, for the enlistment, in the general forces of her Majesty, of soldiers transferred from her *Indian* forces; by 30 & 31 Vict. c. 110 (see 33 & 34 Vict. c. 6,

s. 14), for establishing a *reserve force* of men who have been in her Majesty's service; and by c. 111 (see 33 & 34 Vict. c. 67, s. 14), of a *reserve force* of militia. By 34 & 35 Vict. c. 86, the regular forces of the country are subjected to fresh regulations in regard particularly to the *sale of commissions*, as to which vide post, p. 621, n.

(*l*) As to the period of enlistment (which cannot be originally entered into for a longer period than twelve years), see 30 & 31 Vict. c. 34, and 33 & 34 Vict. c. 67.

(*m*) The first Mutiny Act was in the reign of William and Mary, April, 1689. (MacArthur on Courts Martial, vol. i. p. 40.) The Act for the year 1873 is 36 Vict. c. 10.

the sovereign is empowered to make *Articles of War*, which shall be judicially taken notice of by all judges, and in all courts whatsoever; and to erect or grant authority to convene *courts-martial*, with a jurisdiction to try and punish offences according to such articles of war, and the provisions of the Act (*n*). In order, however, to limit, as far as possible, the power conceded to the crown in this matter, it is enacted that nothing therein contained shall be construed to exempt any officer or soldier from being proceeded against by the ordinary course of law; and that where he is accused of any offence against a subject of the realm, punishable by the known laws of the land, he shall be delivered over to the civil magistrate (*o*): and moreover that no person shall, by such Articles of War, be subjected to suffer any punishment extending to life or limb, or to be kept in penal servitude, for any crime which is not expressed to be so punishable by the Act itself; nor shall be punished in any manner, or under any regulations, which shall not accord with its provisions. And the Act itself accordingly fixes the general nature of the punishments to be inflicted, and makes provision as to certain specific offences. And, among these, it provides that if any officer or soldier shall excite or join in any mutiny, or knowing of it shall not use his utmost endeavours to suppress it, and give information of it to his commanding officer; or shall hold

(*n*) Courts-martial are—1. *General*; 2. *Detachment General*; 3. *Distriet or Garrison*; 4. *Regimental or Detachment*. Of these, only the two first can try a commissioned officer, or pass sentence of death or penal servitude. (36 & 37 Vict. c. 10.) On some occasions the Crown directs a *Court of Inquiry* to be held, the object of which is to ascertain the propriety of resorting to ulterior proceedings against the party charged. As to

courts-martial see 1 Bl. Com. p. 418, note by Coleridge; *Home v. Lord Bentinck*, 2 Brod. & Bing. 130; *In re Mansergh*, 1 B. & Smith, 400. It may be remarked that the Crown is advised in reference to courts-martial and other matters of military law by the *Judge Advocate General*.

(*o*) By 25 & 26 Vict. c. 65, provisions are made for the more speedy trial of persons subject to the Mutiny Act, who are committed for murder or manslaughter.

correspondence with any rebel or enemy of her majesty, or treat or enter into terms with such rebel or enemy without proper licence: or shall misbehave himself before the enemy; or shamefully abandon or deliver up his post, or induce or compel the commanding officer of any post to do so; or shall desert her Majesty's service (*p*); or be found sleeping on his post, or shall leave it before he is relieved; or shall strike or use violence to his superior officer, being in the execution of his office; or shall disobey his lawful commands; or being in confinement in a military prison shall offer any violence against a visitor or officer in the execution of his office;—such offender shall suffer *death* or penal servitude, or such other punishment as a court-martial shall award (*q*).

The system of military law thus devised for the army by the Mutiny Acts, and by the Articles of War framed under their authority, is made applicable by other statutes to the militia also—except as regards punishments affecting life or limb (*r*). And no relief can be afforded by the ordinary courts of law from the sentences (however erroneous) of the courts-martial, in which that law is administered, so long as they exceed not their jurisdiction; the only remedy in such cases being that of an application to the sovereign in council, praying for a revision of the proceedings (*s*).

The establishment of such a system in this country in-

(*p*) Blackstone remarks (vol. i. p. 415), that desertion *in time of war*, was also made a capital felony by 18 Hen. 6, c. 19, and 2 & 3 Edw. 6, c. 2.

(*q*) 36 & 37 Vict. c. 10, s. 15. In all cases, however, where death shall be awarded, her Majesty (or if out of the United Kingdom, the officer commanding in chief), may, instead of causing the sentence to be carried into execution, order the offender to

be kept in penal servitude for any term not less than five years, or to suffer such term of imprisonment, with or without hard labour and solitary confinement, as shall be thought meet. (Sect. 16.)

(*r*) See 42 Geo. 3, c. 40, ss. 89, 103; 55 Geo. 3, c. 168, ss. 1, 2.

(*s*) See *Grant v. Gould*, 2 H. Bl. 100, 101; *In re Poe*, 5 Barn. & Adol. 681, 684; *Wolton v. Gavin*, 16 Q. B. 48.

volves (no doubt), notwithstanding the care with which its provisions are guarded, a partial departure from the principles of our free constitution. And this is, in effect, declared by the preamble of the Acts themselves; which set forth, that no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by judgment of his peers, and according to the known and established law of this realm (*t*): a doctrine entirely conformable to, and apparently founded on, the Petition of Right; which enacts, that no commission shall issue to proceed within this land according to martial law (*u*). But the policy of this exception from ordinary rule may be easily defended, it being impossible by any other means to maintain the proper severity of military discipline: and its legality is put beyond all question by the omnipotence of parliament; the authority of which would be at any time sufficient to supersede altogether the established course of justice, and to proclaim martial law in its stead (*x*).

(*t*) Martial law may be defined as the law (whatever it may be) which is imposed by the military power; and has now no place in the institutions of this country, unless the articles of war established under the Acts just mentioned be considered as of that character. The court of *chivalry*, which had once jurisdiction over life and members in matters of arms (4 Inst. 123; 2 Hawk. 5, 9), has been long disused; and though our sovereigns formerly exercised the right of proclaiming martial law within the kingdom, that prerogative seems to be now denied to them by the Petition of Right.

(*u*) 3 Car. 1; and see 31 Car. 2, c. 1; Hale, Hist. C. L. c. 2.

(*x*) Thus by the statute passed in Ireland, in 1798, for suppression of the rebellion, it was provided that the lord lieutenant might during the rebellion, whether the courts of justice were open or not, issue his orders to the officers of the forces and others, to take the most vigorous measures for suppressing it, and to punish all rebels by death or otherwise, as to them should seem expedient, &c., and to cause all persons arrested as rebels to be tried in a summary manner by courts-martial, &c. Upon the same principle, the Habeas Corpus Act may, upon emergency, be suspended for a time. And this course has been more than once taken (vide sup. vol. I. p. 147).

For the benefit of soldiers careful provisions have been made, the most material of which are the allowance of certain pensions to those who are sick, hurt, and maimed (*y*); and the establishment of the royal hospital at Chelsea for such as are worn out in their duty (*z*). And, if on actual service, soldiers may make *nuncupative* wills, and dispose of their goods, wages, and other personal chattels, without those forms and solemnities which the law requires in other cases (*a*). Our law does not, indeed, extend this privilege so far as the civil law, which carried it to an extreme that borders upon the ridiculous. For if a soldier, in the article of death, wrote any thing in bloody letters on his shield, or in the dust of the field with his sword, it was a very good military testament (*b*). And thus much for the law relating to the *military* force of the Crown.

[The law relating to our *naval* forces is very similar to the former. The royal navy of England hath ever been its greatest defence and ornament; it is its antient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. And yet, so vastly inferior were our ancestors to the present age in point of naval power, that even in the

(*y*) See 26 & 27 Vict. c. 57, and 31 & 32 Vict. c. 90, as to the payment of *regimental debts*, and of sums due to deceased soldiers; and 31 & 32 Vict. c. 83, as to *army chaplains*.

(*z*) As to the *Royal Hospital at Chelsea*, see 47 Geo. 3, st. 2, c. 25; 7 Geo. 4, c. 16; 2 & 3 Will. 4, c. 106, ss. 3, 4; 5 & 6 Vict. c. 70; 6 & 7 Vict. c. 31; 10 & 11 Vict. c. 4;

30 & 31 Vict. c. 110. As to the *Royal Military Asylum at Chelsea for reception of children of soldiers*, 17 & 18 Vict. c. 61. As to *Chelsea Hospital out-pensioners*, 19 & 20 Vict. c. 15.

(*a*) 29 Car. 2, c. 3; 7 Will. 4 & 1 Vict. c. 26; vide sup. p. 187, et vol. I. p. 598.

(*b*) 1 Bl. Com. 417, citing Cod. 6, 21, 15.

[maritime reign of Queen Elizabeth, Sir Edward Coke thinks it matter of boast that the royal navy of England then consisted of *three and thirty* ships (*c*).

Many laws have been made for the supply of the royal navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.

1. First, for their supply. The power of *impressing* seafaring men for the sea service by the royal commission, has been a matter of some dispute, and submitted to with great reluctance. Yet it hath very clearly and learnedly been shown, by Sir Michael Foster (*d*), that the practice of impressing, and granting powers to the admiralty for that purpose, is of very antient date; and hath been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the common law (*e*). And its legality is now so fully established, that it cannot admit of a doubt in any court of justice (*f*); indeed it has been recognized and made the subject of particular provisions in various acts of parliament. Thus the statute 2 Ric. II. c. 4 speaks of mariners being arrested and retained for the king's service, as of a thing well known and practised without dispute; and provided a remedy against their running away (*g*). By 2 & 3 Ph. & M. c. 16, if any waterman, who uses the river Thames, shall hide himself during the execution of any commission of pressing for the king's

(*e*) 4 Inst. 50. By a return presented by the Admiralty to parliament, in the session of 1867, it appeared that there were then belonging to the royal navy 414 steam ships and 29 effective sailing ships afloat, making a total of 443 ships, exclusive of those in the course of equipment.

(*d*) Rep. 154.

(*e*) See also Comb. 245; Barr. 334. Blackstone remarks (vol. i. p. 420), that *ferry-men* are said to be privileged from impressment at common law.

(*f*) See R. v. Tubbs, Cowp. 512. Ex parte Fox, 5 T. R. 277; Ex parte Boggin, 13 East, 549.

(*g*) This Act is not mentioned in the revised edition of the statutes.

[service, he was made liable to heavy penalties (*h*). By another, in the reign of Queen Elizabeth, no fisherman was to be taken by royal commission to serve as a mariner, but the commission was first to be brought to two justices of the peace, inhabiting near the sea coast where the mariners were to be taken; to the intent that the justices might choose out and return such a number of able-bodied men, as in the commission was contained, to serve her majesty (*i*). And by several other Acts of later date (now repealed) especial protections were allowed to seamen in particular circumstances, to exempt them from being impressed.]

But besides this method of impressing, which is only defensible from public necessity, to which all private considerations must give way, the royal navy is also largely, and in ordinary times exclusively, supplied by voluntary enlistment (*k*). Indeed, great advantages in point of wages are given to volunteer seamen (*l*); and where they are already engaged in the merchant service, they are enabled to leave it, without punishment or forfeiture, in order to engage in that of her majesty (*m*).

2. The method of ordering seamen in the royal fleet is closely analogous to that established for the government of the army; but there is this difference between them, that the scheme of naval discipline, (comprised in what are known as “The Articles of the Navy,”) was embodied in a permanent statute 22 Geo. II. c. 33 (amended by subse-

(*h*) This Act was repealed by 7 & 8 Geo. 4, c. lxxv, s. 1.

(*i*) 5 Eliz. c. 5. Repealed by 31 & 32 Vict. c. 45, s. 71.

(*k*) As to the enlistment of sailors, see 5 & 6 Will. 4, c. 24; 16 & 17 Vict. c. 69. As to the limitation of the term of compulsory service in the navy, see 5 & 6 Will. 4, c. 24; 16 & 17 Vict. c. 69. By sect. 9 of the latter Act the term may be extended, as occasion may require,

by her Majesty’s proclamation.

(*l*) See also 22 & 23 Vict. c. 40, as to a reserve volunteer force of seamen, and 26 & 27 Vict. c. 69; 35 & 36 Vict. c. 73, as to the service of officers of the merchant service as reserve officers to the royal navy; and 36 & 37 Vict. c. 77, as to a royal naval artillery volunteer force.

(*m*) See 17 & 18 Vict. c. 104, s. 214.

quent Acts), instead of being provided for by an annual Act; and is now laid down in the 29 & 30 Vict. c. 109 (*m*), called the “Naval Discipline Act, 1866,” which is, like its predecessors, permanent in its character (*n*). [From whence this distinction arose, it is hard to assign a reason, unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for its regulation expedient, and the temporary duration of the army, which subsisted only from year to year. But whatever was apprehended at the first formation of the Mutiny Act, the annual renewal of the statute authorizing our standing force has made this distinction idle. For if from experience past we may judge of future events, the army is now lastingly engrafted into the British constitution; with this singularly fortunate circumstance, that any branch of the legislature may put an end to its legal existence, merely by refusing to concur in its further continuance.]

This Act for the government of the navy, after defining a great variety of offences—some of them having reference to a state of war (*o*), and others being of a nature to which the ordinary law applies,—and fixing in each case the appropriate punishment, proceeds (sect. 56) to provide that any offence triable under that Act may be

(*m*) This Act repeals the 27 & 28 Vict. c. 119, and the 28 & 29 Vict. c. 115, on the same subject.

(*n*) The first parliamentary enactment for the government of the fleet was 13 Car. 3, st. 1, c. 9; but this statute was repealed by 22 Geo. 2, c. 33; which last Act, says Blackstone (vol. i. p. 421), was passed after the peace of Aix la Chapelle, “to remedy some defects which “were of fatal consequence in conducting the preceding war.” This Act, with others for its amendment, was repealed by 23 & 24 Vict. c. 123.

(*o*) These are chiefly misconduct in the presence of the enemy, communications with the enemy, neglect of duty, mutiny, insubordination, and desertion. Many of these, as defined by the articles of war established in the Act, are capital; but the punishment of death (except in the case of mutiny), awarded by the sentence of a court-martial, is not to be inflicted till the sentence has been confirmed by the Admiralty or the commander-in-chief on a foreign station. (29 & 30 Vict. c. 109, s. 53.)

tried and punished by court-martial; the law relative to which is in general the same as with respect to offences of the military kind (*p*); and any offence triable under the Act, not committed by an officer, and not thereby made capital, may, under such regulations as the Admiralty may from time to time issue, be summarily tried and punished by the officer in command of the ship to which such offender belongs; subject, however, to certain restrictions thereby laid down. But, at the same time, it provides (sect. 101) that nothing in that Act contained shall be deemed to supersede the authority or power of any court of ordinary civil or criminal jurisdiction in her majesty's dominions, in respect of any offence mentioned in that Act, which may be punishable or cognizable by the common or statute law.

3. With regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers. Provision is made for their relief when maimed, or wounded, or superannuated, and for their reception and maintenance at the Royal Hospital at Greenwich (*q*). They have also the same power of making nuncupative testaments (*r*).

Besides seamen ordinarily so called, we may remark here, that in Her Majesty's fleet and naval service is comprised that species of force commonly termed the *Royal Marines*. And for the regulation of these also,—when quartered (as they often are) on shore, or sent to do duty on board of transports or merchant ships, or under other circumstances in which they are not subject to the laws relating to the government of Her Majesty's

(*p*) Vide sup. pp. 590, 591.

(*q*) See 10 Geo. 4, c. 26; 8 & 9 Vict. c. 22; 12 & 13 Vict. c. 28; 13 & 14 Vict. c. 24; 32 & 33 Vict. c. 44; 33 & 34 Vict. c. 100. As to *Greenwich Hospital out-pension-*

ers, see 19 & 20 Vict. c. 15. As to the application of the funds of Greenwich Hospital, see 28 & 29 Vict. c. 89; 35 & 36 Vict. c. 67.

(*r*) Vide sup. p. 187, et vol. I. p. 598.

forces by sea,—there is passed an annual Mutiny Act, as in the case of the army (*t*); and the admiralty is thereby empowered to make articles of war for their better government and punishment in case of misbehaviour. And thus much for the law relating to the *naval* force of the crown (*u*).

[We have now chalked out all the principal outlines of that vast title of the law, the supreme executive magistrate, or the king's majesty. But before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the executive magistrate, or prerogative of the Crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting and restraining this prerogative have been made within the compass of little more than two centuries past; from the Petition of Right in the third year of Charles the first, to the present time. So that the powers of the Crown are now, to all appearance, greatly curtailed and diminished since the reign of King James the first: particularly by the abolition of the Star Chamber and high commission courts in the reign of Charles the first; by the disclaiming of martial law, and the power of levying taxes on the subject, by the same prince; by the disuse of forest laws, and by the many excellent provisions enacted under Charles the second; especially the

(*t*) The Marine Mutiny Act for 1873 is the 36 & 37 Vict. c. 11. As to the term for which persons may be enlisted to serve in the marine force, see 10 & 11 Vict. c. 63, and 20 Vict. c. 1.

(*u*) As to the *pay of the navy*, see 28 & 29 Vict. c. 106. As to the *civil department of the admiralty*, ib., and see 2 Will. 4, c. 40. As to *naval coast volunteers*, 16 & 17 Vict. c. 73; 26 & 27 Vict. c. 5. As

to the *coast guard*, 19 & 20 Vict. c. 83. As to the *Naval Medical Supplemental Society*, 11 & 12 Vict. c. 58; 22 Vict. c. 28; 24 & 25 Vict. c. 108; 26 & 27 Vict. c. 111. As to *Chatham Dockyards*, 24 & 25 Vict. c. 41. As to *protecting her Majesty's naval and victualling stores*, 32 & 33 Vict. c. 12. As to *providing fortifications to protect dockyards, &c.*, 25 & 26 Vict. c. 78.

[abolition of military tenures, purveyance and preemption; by the Habeas Corpus Act, and by the Act to prevent the discontinuance of parliaments for above three years. And, again, (since the Revolution,) by the strong and emphatical words in which our liberties are asserted in the Bill of Rights and Act of Settlement; by the Act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the house of commons; by rendering the seats of the judges permanent, and their salaries liberal and independent; and by restraining the royal pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the Crown is impoverished and stripped of all its antient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think that the balance is inclined pretty strongly to the popular scale; and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our constitution intended.

But, on the other hand, it is to be considered that every prince, in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life (*x*). This restores to him that constitutional independence, which, at his first accession, seems, it must be owned, to be wanting. And then, with regard to power, we may find perhaps that the hands of government are at least sufficiently strengthened: and that an English monarchy is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. For—not to speak of the patronage which is vested in different departments of the executive power with reference

(*x*) Vide sup. p. 579.

[to the selection of our naval and military officers, to colonial appointments, and to the judicial and other offices of the civil service—the placing in the hands of the Crown the entire collection and management of our vast public revenue has given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the officers of customs, and the multitude of dependents on the customs, in every port of the kingdom; the officers of excise and their numerous subalterns in every inland district; the surveyors, assessors and collectors of the taxes; the post-masters and their servants, planted in every town and upon every public road; the distributors of stamps, who are full as scattered and full as numerous; and a variety of other officers. All these are either mediately or immediately appointed by the Crown, and removable at pleasure without any reason assigned: these, it requires but little penetration to see, must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added the frequent opportunities of conferring particular obligations on individuals, which will greatly increase this influence; and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though perhaps the unforeseen, consequence of erecting our funds of credit, and, to support them, establishing our present perpetual taxes; the whole of which is entirely new since the restoration in 1660; and by far the greatest part since the revolution in 1688. All which put together give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.]

CHAPTER IX.

OF THE NOBILITY AND OTHER RANKS.



IT has been shown in a former place, that the sovereign is the fountain of honour (*a*); it being a part of his prerogative to confer titles of honour (or, in the language of the law, *dignities*,) and other personal distinctions, upon such of his subjects as may appear to deserve those marks of royal favour (*b*). Among these dignities, the principal is that of the peerage, of which we had occasion to speak when the constitution of parliament was under discussion (*c*). We then took some view of the peerage, or lords of parliament, considered as a branch of the legislature. But, besides this, their collective capacity, the peers constitute a distinct order of persons, individually elevated above the rest of their fellow-subjects by superior rank and privilege. And in this sense they are termed the *nobility* of the realm, as distinguished from the other order of the state, viz. the *commonalty*; to which last class all persons alike belong (whatever may be the difference of rank and station which in other respects may exist between them), who are not of the nobility or peerage,—there being, in a legal sense, but two general divisions of rank in this country, that of peers (or nobles) and commoners, including in the latter even the children of the nobility. First, then, as to the nobility or peerage, it is to be observed, that all degrees of nobility are not of equal antiquity. Those now in use

(*a*) Vide sup. p. 514.

(*c*) Vide sup. p. 328 et seq.

(*b*) See 4 Inst. 363.

among us are dukes, marquesses, earls, viscounts and barons (*d*).

1. [A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family (*e*). Among the Saxons, the Latin name of dukes, *duces*, is very frequent; and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called *heretoga* (*f*); and in the laws of Henry the first, (as translated by Lambard,) we find them called *heretochii*. But after the Norman conquest, though the kings themselves continued for many generations *dukes* of Normandy, they did not honour any subjects with this title till the time of Edward the third; who in the eleventh year of his reign created his son, Edward the Black Prince, Duke of Cornwall; and many, of the royal family especially, were afterwards raised to the like honour. However, in the reign of Queen Elizabeth, A.D. 1572, the whole order became utterly extinct; but it was revived about fifty years afterwards by her successor, (who was remarkably prodigal of honours,) in the person of George Villiers, Duke of Buckingham (*g*).

2. A *marquess*, *marchio*, is the next degree of nobility. His office formerly (for dignity and office were at one time more generally in combination than at present) was to guard the frontiers and limits of the kingdom, which were called the marches, from the Teutonic word

(*d*) For an account of these titles on the continent of Europe, and their subsequent introduction into this island, see Selden's *Titles of Honour*.

(*e*) Camden's *Brit. tit. Ordines*. The title of *prince* and *princess* appertains exclusively to the issue of the sovereign, and is not a degree of nobility. As to the heir appa-

rent being created Prince of Wales, vide sup. p. 451.

(*f*) This is apparently derived from the same root as the German *herzog*, the antient appellation of dukes in that country. Seld. *Tit. of Hon.* pt. 2, c. 1, xxii.

(*g*) See Camden's *Britan. tit. Ordines*; Spelman, *Gloss.* 191.

[*marche*, a limit; such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons who had command there, were called lords marchers, or *marquesses*; whose authority in Wales was abolished by statute 27 Hen. VIII. c. 27: though the title had, long before, been made a mere ensign of honour; Robert Vere, Earl of Oxford, being created Marquess of Dublin, by Richard the second in the eighth year of his reign (*h*).

3. An *earl* is a title of nobility so antient that its original cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons there were *ealdormen*, *quasi* elder men, signifying the same as *senior* or *senator* among the Romans, and synonymous, or nearly so, with *eorls*; and that these were also called *schiremen*, because they had each of them the civil government of a several division or shire. In Latin, earls were called *comites* (a title first used in the empire), from being the sovereign's attendants: "*a societate nomen sumpserunt, reges enim tales sibi associant*" (*i*). After the Norman conquest they were for some time called *counts* or *countees*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earl* is now become a mere title, and he has nothing to do with the civil government of the county (*h*); which is now entirely devolved on his deputy, *i.e.*, the sheriff. In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him "trusty and well-beloved *cousin*;" an appellation as antient as the reign of Henry the fourth: who, being either by his wife, his mother, or his sisters, actually related or allied to every earl then in

(*h*) 2 Inst. 5.

(*i*) Bracton, l. 1, c. 8; Flet. l. 1, c. 5.

(*h*) The *military* superintendence

of each county, is committed by the crown to a *lord lieutenant*, as to whom vide sup. p. 585.

[the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public acts: from whence the usage has descended to his successors, though the reason has long ago failed.

4. The sheriff of the county being the earl's deputy, or *vice-comes*, that name was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry the sixth, when, in the eighteenth year of his reign, he created John Beaumont a peer by the name of *Viscount* Beaumont, which was the first instance of the kind (*l*).

5. A *baron's* is the most general and universal title of nobility; for antiently every one of the peers of superior rank had also a barony annexed to his other titles (*m*).] At the time of the Conquest, indeed, the temporal nobility consisted only of earls and barons; and by whatever right the earls and the mitred elergy before that time might have attended the general council of the nation, it clearly appears that they afterwards sat in parliament in the character of barons only (*n*). [But it hath sometimes happened, that when an antient baron hath been raised to a new degree of peerage, in the course of a few generations, the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony: and there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours: so that now the rule doth not hold universally that all peers are barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be that the barons were the same as the lords of manors, or other estates, holding of the king *in capite* (*o*). For it may be collected from

(*l*) 2 Inst. 5.

(*m*) Inst., ubi sup.

(*n*) Christian's Blackstone, vol. i. p. 393.

(*o*) Spelm. Glos. Baronia.

[King John's *Magna Charta*, that originally all lords or owners of estates that so held were called barons, and had seats in the great council or parliament: till about the reign of that prince the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the principal tenants, called the greater barons, in person; leaving the small ones to be summoned by the sheriff, and, (as it is said,) to sit by representation in another house, which gave rise to the separation of the two houses of parliament(*p*). By degrees the title came to be confined to the greater barons, or lords of parliament only. And there were no other barons among the peerage, but such as were summoned by writ in respect of the tenure of their lands or baronies, till Richard the second first made a barony a mere title of honour, by conferring it on divers persons by his letters-patent(*q*).

Having made this short inquiry into the original of our several degrees of nobility, we shall next consider the manner in which they may be created. The right of peerage seems, as above explained, to have been originally territorial: that is, annexed to lands, honours, castles, manors, and the like; the proprietors and possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign. And, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain antient baronies annexed, or supposed to be annexed, to their episcopal lands(*r*): and thus, in the eleventh year of Henry the sixth, the possession of the castle of Arundel was adjudged to confer on its possessor an earldom *by tenure*(*s*); of which mode of

(*p*) Gilb. Hist. of Exch. c. 3; (*q*) Co. Litt. 9 b; Seld. Jan. Seld. Tit. of Hon. pt. 2, c. 5, xxi. Angl. 2, § 66.

Vide sup. p. 321.

(*r*) Vide sup. p. 329.

(*s*) Seld. Tit. of Hon. pt. 2, c. 9, v.

[title to a peerage, there are several other examples on record (*t*). But afterwards, when alienations grew to be frequent, the dignity of peerage was confined (as the general rule) to the lineage of the party ennobled, and instead of territorial became personal.] Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; and the alienation of his territorial possessions had no longer, except in the rare cases above referred to, the effect of transferring the peerage itself. And a peerage may now be created without connecting it even nominally with any particular locality (*u*); though it has remained usual in creating a man a peer to name him baron, earl, or the like, of some specified place.

[Peers are now created either by writ, or by patent: for those who claim by prescription must suppose either a writ or a patent made to their ancestors; though by length of time it is lost. The creation by writ, or the king's letter, is a summons to attend the house of peers, by the style and title of that barony which the king is pleased to confer: that by patent, is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more antient way; but a man is not ennobled thereby, unless he actually take his seat in the house of lords: and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to

(*t*) Cruise, Dig. vol. iii. p. 185. It is stated in the Fourth Report of the Lords' Committee on Peerages, p. 338, that there were then (in 1825) two dignities, that of Earl of Arundel and Baron of Abergavenny, which had always been claimed as dignities *by tenure*. Since that date, the question as to whether a *barony* can now be claimed by tenure, has been closely sifted in the case of the Berkeley Peerage (reported 8 House of Lords' Cases, p. 21); and, in re-

ference to that claim, it was decided (26th February, 1861), that no legal right to be summoned to and sit in parliament can exist, at the present day, in any tenant for life or devisee of hereditaments, the possession of which conferred a barony in the reign of Henry II. It was also observed, that no *earldom* by tenure now exists,—that of Arundel having (as such) been put an end to by 3 Car. 1, c. iv.

(*u*) Cruise, Dig. vol. iii. p. 219.

[evidence an hereditary barony (*x*) And therefore the most usual, because the surest way, is to grant the dignity by patent; which enures to a man according to the limitations thereof, though he never himself makes use of it (*y*). Yet it is frequent to call up the eldest son of a peer to the house of lords by a writ of summons, in the name of his father's barony: because in that case there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather. Creation by writ has also one advantage over that by patent: for a person created by writ holds the dignity to him and the heirs general—that is, male and female—of his body (*z*), without any words to that purport in the writ (*a*). But in letters-patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life (*b*). For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all (*c*).] A peerage, however,

(*x*) Whitlocke of Parl. ch. 114.

(*y*) Co. Litt. 16 b.

(*z*) Cruise, Dig. vol. iii. p. 223; Devon Peerage Case, 5 Bligh, N. S. 313; Lord Coke (Co. Litt. 9, 16), and after him Blackstone (vol. i. p. 401), says “to him and his *heirs* :” but this must be understood heirs *of the body*; for it is clear with respect to dignities created without words of express limitation, that they are not descendible to the heirs collateral. (See Wiltes Claim of Peerage, Law Rep., 4 Eng. and Ir. Ap. 126.)

(*a*) The mode of descent, however, may by express words in the writ of summons be confined to males. (Cru. Dig. vol. iii. p. 205.) And it may be remarked that where the father's barony is limited by patent to him and the heirs male of his

body, and his eldest son is called up to the House of Lords by writ with the title of this barony; the writ in this case will not create a fee or a general estate tail, so as to make a female capable of inheriting the title, but upon the death of the father the two titles unite, or become one and the same. (Christian's Blackstone.)

(*b*) Co. Litt. 9, 16.

(*c*) Letters-patent, conferring the dignity of baron *for life* merely, do not enable the grantee to sit and vote in the House of Lords; nor will such letters-patent, with the usual writ of summons to the house. This was so resolved by the Committee for privileges, on the 22nd February, 1856, in reference to the peerage which had been conferred on Lord Wensleydale.

is usually conferred by the letters-patent, on the grantee and the heirs male of his body (*c*); though it may be on the grantee and the heirs female of his body, or on him and the heirs general of his body. Or it may be made to descend to some particular heirs male,—as where it is limited to a man, and the heirs male of his body by Elizabeth, his present lady, and not to such heirs by any former or future wife (*d*). It may also be limited to the grantee and his heirs collateral as well as lineal; and if a peerage be granted to a man “*and his heirs male*,” it will descend, in default of heirs male of his body, to his heirs male collateral (*e*). The right of primogeniture takes place between males in the descent of dignities; but it is otherwise as to females (*f*). For if a man holds a peerage to him and the heirs of his body, and dies, leaving only daughters, the dignity is in suspense or abeyance,—as we had occasion to remark in a former part of this work,—and the sovereign may bestow it on which of them he pleases (*g*).

[Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered (*h*). And first we must observe, that, in cases of treason and felony, a nobleman shall be tried by his *peers*. The great are always obnoxious to popular envy: and were they to be judged by the people, they might be in danger from the prejudice of their judges;

(*c*) Cru. Dig. vol. iii. pp. 218, 245; Devon Peerage case, 5 Bligh, N. S. 313; Wiltes Claim of Peerage, Law Rep., 4 Eng. and Ir. Ap. 126.

(*d*) 1 Bl. Com. 401.

(*e*) Devon Peerage Case, *ubi sup.* In a conveyance of *land*, the effect of such a limitation would be different; for, if the crown were the

grantor, the grant would be *void*. (Earl of Oxford's case, W. Jo. 105.)

If the conveyance were between subject and subject and *inter vivos*, it would operate as a conveyance in fee simple; if by devise, as an estate tail. (Vide *sup.* vol. I. p. 245.)

(*f*) Cru. Dig. vol. iii. p. 244.

(*g*) Vide *sup.* vol. I. p. 406.

(*h*) Vide *sup.* pp. 330, 455.

[and would, moreover, be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *Magna Charta*, c. 29. In the case of crimes, however, below the degree of felony, such as libel, perjury, conspiracy, and other misdemeanors, this rule is not observed, and a peer is tried by an ordinary jury in the court where the indictment is found (*k*). And it is said, that the privilege does not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies, which they hold *jure ecclesiæ*, are yet not ennobled in blood, and consequently not peers with the nobility (*l*). As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor, Duchess of Gloucester, wife to the lord protector, was accused of treason, and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of Cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9; which declares the law to be, that peeresses, either in their own right, or by marriage, shall be tried before the same judicature as other peers of the realm (*m*). If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers: but she communicates no rank to her husband (*n*). If she be only noble by marriage, then, by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost (*o*). Yet if a duchess dowager marries a baron, she continues a duchess still; for all the nobility are *pares*, and therefore it is no degradation (*p*).

(*k*) Vide post, bk. vi. c. xiv.

(*l*) 3 Inst. 30, 31.

(*m*) Isabel Countess of Rutland's case, Moore, 769; 2 Inst. 50; 6 Rep. 3; Staundf. P. C. 215.

(*n*) Harg. Co. Litt. 326 b; 29 b, n. (1).

(*o*) Dyer, 79; Co. Litt. 16.

(*p*) Co. Litt. 16 b; 2 Inst. ubi sup.

Mr. Hargrave, in a note on the passage in Co. Litt., observes that it is laid down in Ow. 82, and Bend. 37, S. C. that she takes in such case the dignity of the second husband; and Mr. Cruise states, that, at the coronation of King George the third, the Duchess Dowager of Leeds, then the wife of Lord Portmore, claimed

[And by courtesy, or the usage of society, all dowager peeresses, though afterwards married to commoners, are ordinarily addressed by their former title. A peer, or peeress, (either in her own right or by marriage,) cannot be arrested, or outlawed, in civil proceedings (*q*); but they have no exemption in these or in any other particulars, in cases of treason, felony or actual breach of the peace (*r*). They have also some peculiar privileges annexed to their peerage, in the course of judicial proceedings. A peer, sitting in judgment, gives not his verdict upon oath, like an ordinary jurymen, but upon his honour (*s*); he answers also to bills in chancery upon his honour, and not upon his oath (*t*); but, when he is examined as a witness either in civil or criminal cases, he must be sworn (*u*): for the respect which the law shows to the honour of a peer does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis* (*x*). The honour of peers is, however, so highly tendered by the law, that it has been made more penal to spread false reports of them, and certain other great

to walk as a Duchess; but it was refused. (Cruise, Dig. vol. iii. p. 220.)

(*q*) 2 Hale, P. C. 195; Bac. Abr. Priv. (C. 1); Cassidy v. Stenart, 2 Man. & G. 469. It may be noticed that imprisonment for debt is now in most cases abolished with regard to *all* persons. (32 & 33 Vict. c. 62.)

(*r*) 4 Inst. 24; 2 Wils. 159; 11 Harg. St. Tr. 305. The privilege called *benefit of clergy*,—(as to which vide post, bk. VI. c. XXIII., *in notis*,) extended to *peers*, free from the conditions with which it was accompanied in the case of lay commoners (see 1 Edw. 6, c. 12, and as to *peeresses*, Duchess of Kingston's case, 11 Harg. St. Tr. 264). But *benefit of clergy* was abolished altogether by 7 & 8 Geo. 4, c. 28. And

peers are now, in respect of punishment for crimes, on the same footing with other subjects of the realm. (4 & 5 Vict. c. 22.)

(*s*) 2 Inst. 49.

(*t*) 1 P. Wms. 146. See Consol. Gen. Ord. in Chancery, 1860, XV. par. 6.

(*u*) Meers v. Lord Stourton, Salk. 512. So, if a peer be examined as a witness in the high court of parliament, he must be sworn. Thus the Bishop of Oxford was sworn in the impeachment of Lord Macclesfield, and Lord Mansfield (then Lord Stormont) in that of Mr. Hastings. (Christian's Blackstone, vol. i. p. 401.)

(*x*) Earl of Lincoln's case, Cro. Car. 64.

[officers of the realm, than of other men: such scandal being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers antient statutes (*y*).] With respect to the dignity and privileges of peerage here mentioned, it is lastly to be observed, that they are not extended by the law to such persons as hold foreign titles of nobility, who are in this country no more than commoners. But (since the union with Scotland) all the peers of Scotland are peers of Great Britain with all attendant privileges, save only those belonging to a seat in the House of Lords, which are confined to the sixteen representative peers; and (since the union with Ireland) all peers of Ireland, with the exception of such as are elected members of the House of Commons, have all the privileges of peerage—save only those belonging to a seat in the House of Lords, which are confined to the twenty-eight representative peers of that country (*z*).

[A peer cannot surrender or lose his nobility but by death or attainder; though there was an instance in the reign of Edward the fourth of the degradation of George Neville Duke of Bedford, by act of parliament, on account of his poverty, which rendered him unable to support his dignity (*a*). But this is a singular instance, which serves at the same time, by having happened, to show the power of parliament; and, by having happened but once, to show how tender the parliament hath been in exerting so high a power. It was once asserted, indeed, that if a baron wastes his estate, so that he is not able to

(*y*) 3 Edw. 1, c. 34; 2 Ric. 2, st. 1, c. 5; 12 Ric. 2, c. 11.

(*z*) Vide sup. vol. I. pp. 88, 97.

(*a*) 4 Inst. 335. The preamble to the Act is remarkable: "Forasmuch as oftentimes it is seen, that when any lord is called to high estate, and hath not convenient

"livelihood to support the same
"dignity, it induceth great poverty
"and indigence, and causeth oftentimes great extortion, embracery
"and maintenance to be had; to the great trouble of all such countries where such estate shall
"happen to be; therefore," &c.

[support the degree, the king may degrade him (*b*); but it is expressly held by later authorities, that a peer cannot be degraded but by *act of parliament* (*c*).] If a peer becomes a bankrupt he is, by the 34 & 35 Viet. c. 50, disqualified from sitting and voting in the House of Lords until his bankruptcy has determined.

The commonalty, like the nobility, are divided into several degrees. But, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so in the same sense, the commoners, though some are greatly superior to others, yet all are, in law, peers, in respect of their want of nobility (*d*).

[The first name of dignity, next beneath a peer, was anciently that of *vidames*, *vice-domini*, *vavasores* or *valvasors* (*e*): who are mentioned by our antient lawyers (*f*) as *virī magnæ dignitatis*; and Sir Edward Coke speaks highly of them. Yet they are now quite obsolete; and our legal antiquaries are not even agreed upon their original or antient office.

Now, therefore, the first personal dignity, after the nobility, is a *knight* of the order of St. George, or *of the Garter*; first instituted (in the opinion of Selden) by Edward the third, in the eighteenth year of his reign (*g*). Next (but not till after certain *official* dignities, including, among others, privy councillors, and the judges) follows a *knight banneret* (*h*). Who indeed by statute 5 Ric. II. st. 2, c. 4, and 14 Ric. II. c. 11, is ranked next after barons: and his precedence before the younger sons of viscounts was confirmed to him by order of King James the first, in the tenth year of his reign (*i*). But, in order to entitle

(*b*) Moore, 768.

(*c*) Earl of Shrewsbury's case, 12 Rep. 107; Knowles's case, 12 Mod. 56.

(*d*) 2 Inst. 29.

(*e*) Camden, Britan. tit. Ordines.

(*f*) Bracton, l. 1, c. 8.

(*g*) Selden, pt. 2, c. 5, xl. citing Froissart, vol. i. c. 101.

(*h*) See the Table of Precedence, post, p. 615.

(*i*) Seld. Tit. of Hon. pt. 2, c. 11, iii.

[himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war (*k*). Else he ranks after *baronets*; who are the next order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by King James the first, in the year 1611; in order to raise a competent sum for the reduction of the province of Ulster in Ireland (*l*): for which reason all baronets have the arms of Ulster superadded to their family coat (*m*).] Next follow *knights of the bath*; an order instituted by King Henry the fourth, revived by King George the first, and newly regulated in the present reign (*n*). They are so called from the ceremony, formerly observed of bathing the night before their creation. [The last of these inferior nobility are *knights bachelors* (*o*); the most antient, though the lowest, order of knighthood amongst us: for we have an instance of King Alfred's conferring this order on his son Athelstan (*p*). The custom of the antient Germans, was to give their young men a shield and a lance in the great council. This was equivalent to the *toga virilis* of the Romans: before this they were not

(*k*) 4 Inst. 6.

(*l*) One hundred gentlemen advanced each one thousand pounds; for which this title was conferred upon them.—2 Rap. 185 fo. (Christian's Blackstone, vol. i. p. 403.)

(*m*) The arms of Ulster are, a hand *gules*, or a bloody hand, in a field *argent*. (Christian's Blackstone.)

(*n*) See London Gazette, 25 May, 1847; 16 Aug. 1850.

(*o*) The most probable derivation of the word bachelor is from *bas* and *chevalier*, an inferior knight; and thence latinized into the barba-

rous word *baccalaureus*. (Duncange, Bac.) The lowest graduates in the universities are styled *bachelors*, and were, formerly, addressed with *sir* before their surname; as in Latin they are still called *domini*. It is somewhat remarkable, that whilst this feudal word has long been appropriated to single men, another feudal term of higher dignity, viz. *baron*, should, in legal language, be applied to those who are married. (Christian's Blackstone.)

(*p*) Wil. Malms. lib. 2.

[permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community (*q*). Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati*: *aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback: for it is observable (*r*) that almost all nations call their knights by some appellation derived from a horse (*s*). They are also called in our law *milites*, because they formed a part of the royal army, in virtue of their feudal tenures: one condition of which was, that every one who held a knight's fee immediately under the crown,—which in Edward the second's time amounted to 20*l.* *per annum*,—was obliged to be knighted, and attend the king in his wars, or pay a fine for his non-compliance (*t*). The exertion of this prerogative, as an expedient to raise money in the reign of Charles the first, gave great offence, though warranted by law and by the recent example of Queen Elizabeth. But it was by the statute 16 Car. I. c. 16, abolished; and this kind of knighthood has since that time fallen into great disregard.

These, Sir Edward Coke says, are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship* (*u*). But before these last, the heralds rank all colonels, serjeants at law, and doctors in the three learned professions (*x*).

(*q*) Tac. de Morib. Germ. 13.

(*r*) Camd. Brit. tit. Ordines; Co. Litt. 74.

(*s*) It does not appear that the English word *knight* has any reference to a horse; for knight, or cniht in the Saxon, signified *puer*, *servus*, or attendant. See Seld. Tit. Hon. pt. 2, c. 5, xxxiii.; Christian's Blackstone, vol. i. p. 464.

(*t*) See St. de Milit., 1 Ed. 2; 2 Inst. 594.

(*u*) 2 Inst. 667.

(*x*) The rules of precedence in England may be reduced to the following Table, (taken principally from Blackstone,) in which those marked * are entitled to the rank here allotted them, by statute 31 Hen. 8, c. 10; those marked †, by

[Esquires and gentlemen are confounded together by Sir Edward Coke; who observes, that every esquire is

statute 1 W. & M. c. 21; those marked ||, by letters patent, 9, 10, & 14 Jac. 1, (which see in Seld. Tit. of Hon. pt. 2. c. 5, xlv. ; c. 11, iii. ;) and those marked ‡, by antient usage and established custom; (for which see, among other authorities, Camden's *Britannia*, tit. *Ordines*; Milles's *Catalogue of Honour*, edit. 1610; and Chamberlayne's *Present State of England*, b. 3, ch. 3.)

TABLE OF PRECEDENCE.

- * The king's (or queen regnant's) children and grandchildren.
- * ————— brethren.
- * The king's (or queen regnant's) uncles.
- * ————— nephews.
- * Archbishop of Canterbury.
- * Lord Chancellor or Keeper, if a baron.
- * Archbishop of York,
- * Lord Treasurer,
- * Lord President of the Council,
- * Lord Privy Seal,
- * Lord Great Chamberlain,
- * Lord High Constable,
- * Lord Marshal,
- * Lord Admiral,
- * Lord Steward of the Household,
- * Lord Chamberlain of the Household,
- * Dukes.
- * Marquesses.

- ‡ Dukes' eldest sons.
- * Earls.
- ‡ Marquesses' eldest sons.
- ‡ Dukes' younger sons.
- * Viscounts.
- ‡ Earls' eldest sons.
- ‡ Marquesses' younger sons.
- * Secretary of State, if a bishop.
- * The Bishop of London.
- * ————— Durham.
- * ————— Winchester.
- * Other Bishops.
- * Secretary of State, if a baron.
- * Barons.
- † Speaker of the House of Commons.
- † Lords Commissioners of the Great Seal.
- ‡ Viscounts' eldest sons.
- ‡ Earls' younger sons.
- ‡ Baron's eldest sons.
- || Knights of the Garter.
- || Privy Councillors.
- || Chancellor of the Exchequer.
- || Chancellor of the Duchy of Lancaster.
- || Chief Justice of the Queen's Bench.
- || Master of the Rolls.
- || Chief Justice of the Common Pleas.
- || Chief Baron of the Exchequer.
- The Lords Justices of Appeal in Chancery (*a*).
- The Vice-Chancellors (*b*).
- || The Judges and Barons of the Exchequer (*c*).

(*a*) 14 & 15 Vict. c. 83.
(*b*) 53 Geo. 3, c. 21; 5 Vict. c. 5, s. 25.
(*c*) As to the judge of the Pro-

bate and Divorce Court see 20 & 21 Vict. c. 77, s. 8, and 22 & 23 Vict. c. 61, s. 3.

[a gentleman (*y*), and a gentleman is defined to be one *qui arma gerit*, who bears coat armour, the grant of which, adds gentility to a man's family; in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire*; for it is not an estate, however large, that confers this rank upon its owner (*z*). Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them (*a*): 1. The eldest sons of knights, and their eldest sons, in perpetual succession (*b*); 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of esquires, Sir Henry Spelman entitles *armigeri natalitii* (*c*); 3. Esquires created by the king's letters-patent, or other investiture; and their eldest

|| Knights Bannerets, royal.

|| Viscounts' younger sons.

|| Barons' younger sons.

|| Baronets.

|| Knights' Bannerets.

‡ Knights of the Bath.

‡ Attorney-General.

‡ Solicitor-General.

‡ Serjeants-at-law (*d*).

‡ Knights Bachelors.

|| Baronets' eldest sons.

|| Knights' eldest sons.

|| Baronets' younger sons.

|| Knights' younger sons.

‡ Colonels.

‡ Doctors.

‡ Esquires.

‡ Gentlemen.

‡ Yeomen.

‡ Tradesmen.

‡ Artificers.

‡ Labourers.

N.B. Married women and widows are entitled to the same rank among each other as their husbands would respectively have borne between themselves, unless such rank is merely professional or official;—and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

(*y*) 2 Inst. 668.

(*z*) See Perrins *v.* The Marine and General Travellers' Insurance Company, 2 Ell. & Ell. 317.

(*a*) 2 Inst. ubi sup.

(*b*) Ibid. 667.

(*c*) Gloss. 43.

(*d*) "See *Serviens ad Legem*:" by Mr. Serj. Manning, p. 263. Blackstone, however, places ser-

jeants after colonels, and in immediate precedence to doctors.

[sons (*d*); 4. Esquires by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown, and are named esquires by the crown in their commission or appointment (*e*). To these, however, may be added barristers-at-law (*f*); and the esquires of knights of the bath, each of whom constitutes three at his installation; and all foreign peers. For not only these, but the eldest sons of peers of Great Britain, (though frequently titular lords,) are only esquires in the law, and must be so named in all legal proceedings (*g*). As for *gentlemen*, says Sir Thomas Smith, they be made good cheap in this kingdom; for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and (to be short), who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman (*h*). A *yeoman* is he that hath free land of forty shillings by the year; who was antiently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, where the law requires one that is *probus et legalis homo* (*i*).

The rest of the commonalty are *tradesmen*, *artificers*, and *labourers*; and as to these (as well as others) it was provided by the statute 1 Hen. V. c. 5, that they must be styled by the name and addition of their estate, degree or mystery, and the place to which they belong, or where

(*d*) The creation of esquires by way of investiture has long been disused. When so created, they used to be invested *calcaribus argentatis*, to distinguish them from the *equites aurati*. In the life of Chancer, we are told that he was created *scutifer* to Edward the third. *Scutifer* is the same as *armiger*; and our word *esquire* is derived from *scutum*, or the French *escu*, a shield.

(Christian's Blackstone, vol. i. p. 406.)

(*e*) See *Talbot v. Eagle*, 1 Taunt. 510.

(*f*) *R. v. Brough*, 1 Wils. 244. It is stated in Blount's Law Diet. and Glossary, that barristers were named *esquires* in the Acts for poll-money.

(*g*) 3 Inst. 30; 2 Inst. 667.

(*h*) Commonw. of Eng. b. 1, c. 20.

(*i*) 2 Inst. 668.

[they have been conversant, in all *indictments* or other legal proceedings on which process of outlawry might be awarded; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process.] But now by 14 & 15 Vict. c. 100, s. 24, it is enacted, that no indictment shall in future be held insufficient for want of, or imperfection in, the addition of any defendant.

CHAPTER X.

OF MAGISTRATES AND OTHER PUBLIC OFFICERS.



[In a former chapter of these Commentaries, we distinguished magistrates into two kinds—supreme, or those in whom the sovereign power of the state resides, and subordinate, or those who act in an inferior secondary sphere (*a*). We have hitherto considered the former kind only; namely, the supreme legislative power—the king, lords and commons in parliament—and the supreme executive power, which is the sovereign; and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

And herein we are not to investigate the powers and duties of her majesty's great officers of state, the principal secretaries, or the like, because they are not in that capacity in any considerable degree the objects of our laws, nor have any very large share of magistracy conferred upon them,—though it may be noticed, that the principal secretaries of state are allowed the power of commitment in order to bring to trial persons accused of treason, or other crimes against the state (*b*);] and have, by several modern provisions of the statute law, been intrusted with certain miscellaneous functions connected with the administration of justice and the social economy of the realm (*c*). [Nor is this the occasion to treat of

(*a*) Vide sup. p. 318.

(*b*) Com. Dig. Officer, E. 8; Entick v. Carrington, 2 Wils. 275.

(*c*) See particularly 5 & 6 Will. 4, c. 38; 6 & 7 Vict. c. 34, ss. 5, 7,

&c. By 21 & 22 Vict. c. 67, certain enactments are repealed, which required returns, as to various matters there specified, to be made to one of the principal Secretaries of State.

[the office and authority of the lord chancellor, or the judges of the courts of justice, because they will find a more proper place in a subsequent part of these Commentaries (*d*). Nor is it necessary to enter into any minute disquisitions with regard to the rights and dignities of mayors and aldermen, or other magistrates of particular corporations; for these are merely private and municipal rights, and confined to the particular franchise. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use, and have a jurisdiction and authority dispersedly throughout the kingdom; and these are principally *sheriffs, coroners, justices of the peace* and *constables*.]

But before we enter upon this disquisition as to particular officers, we shall avail ourselves of this opportunity of making a few remarks on the nature of *offices* in general.

Offices are a species of incorporeal hereditaments (*e*), and were enumerated as such in a former part of this work (*f*). An office has been defined as consisting in the right to exercise a public or private employment (*g*). But we here use the word in its more limited and usual sense, comprising employment only of a public nature (*h*)—such as entitles a man to act in the affairs of others, without their appointment or permission (*i*). The right of nomination to an antient office belongs, in most cases, to the crown; in some, to a subject. And new offices may be created by the crown; but not such as are con-

(*d*) Vide post, bk. v. c. v.

(*e*) But they seem not to be *tenements*, unless they concern the realty. (Co. Litt. 20 a.)

(*f*) Vide sup. vol. i. p. 648.

(*g*) 2 Bl. Com. 36.

(*h*) As to the "superannuation allowance" or retiring pension granted to persons who have held

office, for certain periods, in the permanent civil service of the state, see 22 Vict. c. 26; 23 & 24 Vict. c. 89; 28 & 29 Vict. cc. 68, 113; 29 & 30 Vict. c. 68; 32 & 33 Vict. c. 60; 34 & 35 Vict. c. 36; 35 & 36 Vict. cc. 12, 83; 36 Vict. c. 23.

(*i*) See R. v. Burnell, Carth. 478.

trary to the constitution, or prejudicial to the public (*k*). In some instances they are granted for life, or during good behaviour, in others during pleasure only; and in the case of particular offices, where no inconvenience can arise to the public from such a mode of limitation, they may be granted to a man and his heirs; or to one man for life, remainder over to another; or for a term of years; or if they relate to lands or houses, they are capable of being entailed (*l*). They may be distinguished into offices of trust (comprising those which are judicial), and offices merely ministerial. The former cannot, unless by special enactment, be performed by deputy, the latter usually may (*m*). It is also a general rule with respect to a judicial office, that it cannot be granted in reversion (*n*); because, though the grantee may be able to execute it at the time of the grant, yet, before the office falls, he may become insufficient; but ministerial offices, being capable, in general, of performance by deputy, may be so granted (*o*).

By the 5 & 6 Edw. VI. c. 16, no judicial office, or other office of trust (with some few exceptions), can be sold under pain of disability to dispose of or hold the same. For the law presumes that he who buys an office will, by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public (*p*). And by 49 Geo. III. c. 126, (in extension of the above statute,) it is made highly penal to buy, sell, or negotiate for the sale or purchase of any such office, or of any other of the public appointments in that Act specified (*q*).

(*k*) Bae. Ab. Offices, B.

(*l*) Co. Litt. 20 a.

(*m*) Com. Dig. Officer, D.; see R. v. Ferrand, 3 B. & Ald. 260; R. v. Gravesend, 2 B. & C. 602; R. v. Roberts, 3 Ad. & El. 771.

(*n*) Co. Litt. 3 b; Com. Dig. Officer, B. 14.

(*o*) Com. Dig. Officer, B. 13; 11 Rep. 4.

(*p*) Certain offices in the Queen's Bench and Common Pleas were saleable by the chief justices of those courts respectively till the year 1825, when this custom was abolished by 6 Geo. 4, cc. 82, 83.

(*q*) Vide post, bk. VI. c. VI. It may be here remarked, that under these statutes, the system so long prevailing, under which officers in

Where the right of conferring is in the crown, the appointment (at least in the case of the more important offices) is generally made by letters-patent (*r*); and, to render it complete, the grantee in some cases must be *sworn in*. For, in addition to the oath of allegiance, an "official" oath (well and truly to serve her Majesty) is required to be taken by the chief officers of state (*s*); and a "judicial" oath (to do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or ill will) by the superior judges both of law and equity, and by the justices of the peace for counties and boroughs; and on the acceptance of a variety of inferior offices, though no oath of office is now required, as was formerly the case (*t*), the grantee is some-

the army *purchased* their commissions, was clearly illegal, though the practice was openly carried on and sanctioned by the issue of a royal warrant regulating the prices at which such commissions might be purchased, sold, or exchanged. But in the year 1871, it was resolved by parliament that this system should no longer prevail, and accordingly an act (33 & 34 Vict. c. 86) passed, by which (the regulations above referred to having been first cancelled and determined by royal warrant) it was provided that no person should be punished under the above act for any offence committed in relation to the purchase, sale or exchange of any commission having a regulation price, prior to 1st November, 1871; and that proper compensation should be awarded to all officers holding saleable commissions at that date.

(*r*) As to grant by letters-patent, vide sup. vol. I. p. 618. As to grant of officers' commissions, see 25 Vict. c. 4.

(*s*) 31 & 32 Vict. c. 72 (The Promissory Oaths Act, 1868"). Special oaths are taken by privy councillors, by archbishops and bishops, by peers, baronets and knights, by recruits in the army and marines; and in certain other cases. (Sect. 14.)

(*t*) This was in particular required by the Act passed in the year 1714, "for the security of his Majesty's person and government," viz. the 1 Geo. 1, st. 2, c. 13, which required certain oaths to be taken within six months after accepting any office, on peril of incurring its loss, as well as other disabilities and forfeitures. But every year an act of indemnity used to pass to relieve from forfeiture such persons as had omitted to qualify. (See Lord Mahon's Hist. of Eng. vol. i. p. 374.) And all these oaths and declarations were swept away by 29 & 30 Vict. c. 22, 30 & 31 Vict. c. 62, and the 31 & 32 Vict. c. 72. By 34 & 35 Vict. c. 48 ("The Promissory Oaths Act, 1871"), a variety of Acts connected with this subject are col-

times called upon to make a solemn declaration that he will faithfully perform the duties of the same (*u*).

An office, after it has been granted and duly entered upon, may be forfeited by misconduct, and such misconduct may either consist in neglecting, ceasing, or refusing to perform the duties, (such neglect being by Lord Coke termed *non-user*,) or in improper use of the power entrusted (as in the case of a gaoler voluntarily permitting a prisoner to escape), which he calls *abuser* (*x*): and it is also laid down in the books, that where incompatible offices are granted, the first becomes in some cases void, in others voidable only; and that the grant of an office is also void, if made to a person incapable, from his position, to perform its duties with impartiality (*y*).

Lastly, it is to be observed, that though offices conferred by the sovereign become, as the general rule, vacated by the demise of the crown, an exception has been made by statute in favour of the *judges*, whose commissions are continued by 1 Geo. III. c. 23, during their good behaviour, notwithstanding that event (*z*).

To return now to the particular officers enumerated at the outset, we will consider, first, the law relating to *sheriffs*.

I. [The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, *ŕeine* *ŕeueŕa*, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*; to whom the custody of the

lected into a schedule and expressly repealed.

(*u*) See the 31 & 32 Viet. c. 72, ss. 5, 6, 12.

(*x*) Co. Litt. 233 a; Bac. Ab. Office, M. It may be here remarked, that persons having offices or employments in the public service are frequently required to give security

by means of sureties for the due performance of their duties. See, as to such guaranties, a recent Act, the 30 & 31 Viet. c. 108.

(*y*) Com. Dig. Officer, B. 6; Arkwright v. Cantrell, 7 Ad. & El. 565; R. v. Patteson, 4 B. & Ad. 9.

(*z*) See Bac. Ab. Courts, C.

[shire is said to have been committed at the first division of this kingdom into counties(*b*). But (as we have seen) the earls, in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden,—reserving to themselves the honour, but the labour was laid on the sheriff(*c*). So that now the sheriff does all the king's business in the county: and is entirely independent of the earl; the crown committing *custodiam comitatûs* to the sheriff, and him alone.

Sheriffs were formerly chosen by the inhabitants of the several counties: in confirmation of which it was ordained by statute 28 Edw. I. c. 8, that the people should have election of sheriffs in every shire where the shrievalty is not of inheritance. For antiently in some counties the sheriffs were hereditary; as it is apprehended they were in Scotland till the statute 20 Geo. II. c. 43 (*d*), and the city of London having also the inheritance of the shrievalty of Middlesex vested in their body by charter(*e*).

(*b*) As to counties, vide sup. vol. I. p. 127.

(*c*) Dalton of Sheriffs, c. 1.

(*d*) The office of sheriff may descend on and be executed by a female; for example, the shrievalty of Westmoreland having been granted by King John to Robert de Veteripont and his heirs, it vested at one period in Anne, Countess of Pembroke; who exercised the office in person, and at the assizes at Appleby sat with the judges on the bench (see Harg. Co. Litt. 326). Afterwards it came by descent to the Earl of Thanet: and on the death of that nobleman in 1849, without issue, it became a question whether the office passed under a devise thereof in his will, or escheated to the crown. To remedy

this inconvenience, all hereditary claims and title to the office were by the 13 & 14 Vict. c. 30, abolished, and the crown was empowered to appoint as in other counties. There had been a temporary statute on the same subject, 12 & 13 Vict. c. 42.

(*e*) The election of the sheriffs of London and Middlesex was granted to the citizens of London for ever by a charter of Henry the first, upon condition of their paying 300*l.* a year to the king's exchequer. In the year 1799, the corporation of London made a bye-law imposing a fine of 400*l.* upon every person who, being elected, should refuse to serve the office of sheriff. (See the case of *Evans v. the Chamberlain of London*, 2 Burn, E. L. 185.) As to the shrievalty of London and Middle-

[The reason of these popular elections was assigned in the 28 Edw. I. c. 13, "that the commons might chuse such as would not be a burthen to them." And herein appears plainly a strong trace of the democratical part of our constitution; in which form of government it is an indispensable requisite that the people should choose their own magistrates (*f*). This election was in all probability not absolutely vested in the commons, but required the royal approbation (*g*). However these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. II. st. 2; which enacted that the sheriffs should thenceforth be assigned by the chancellor, treasurer, and the judges, as being persons in whom the same trust might with confidence be reposed. As to the manner in which this duty is to be performed, the statute of Cambridge (12 Ric. II. c. 2) ordained that all that should be called to name or make justices of the peace, *sheriffs*, and other officers of the king, should be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they should judge to be the best and most sufficient (*h*). And the custom now is,—and has been at least ever since the time of Fortescue (*i*), who was chief justice and chancellor to Henry the sixth,—that all the judges, together with the other great officers and privy counsellors, meet in the Exchequer on the morrow of St. Martin,—and then and there the judges propose three persons for each county, to be reported (if approved of)

sex, see also 1 Man. & Gr. 544, n.; and Pulling's Customs of London, 134.

(*f*) Montesquieu, Sp. L. b. ii. c. 2.

(*g*) Blackstone (vol. i. p. 340), assigns as his reason for this belief, that in the Gothic constitutions, in the election of the sheriffs, the people (*incolæ territorii*) chose twelve electors, who nominated *three* per-

sons, *ex quibus rex unum confirmabat*; and that such election required confirmation by the king. He cites Stiern. De Jure Goth. l. i. c. 3.

(*h*) 12 Ric. 2, c. 2, was repealed by 34 & 35 Vict. c. 48. See also 14 Edw. 3, st. 1, c. 7; 23 Hen. 6, c. 9; 21 Hen. 8, c. 20.

(*i*) De Leg. c. 24.

[to the king, who afterwards appoints one of them to be sheriff(*l*).] And such appointment generally takes place about the end of the following Hilary Term(*m*). It is to be understood, however, that the ceremony here described is not observed upon the *occasional* appointment of a sheriff, as on the death of an existing officer; the appointment is then the mere act of the crown. But it has been said that the appointment of a *pocket* sheriff (that is, a sheriff not of the number nominated in the Exchequer) is a practice of questionable legality(*n*). [And though in one case it was laid down that Queen Elizabeth might, by her prerogative, make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium* (*o*); yet this seems bad law, inasmuch as the doctrine of *non obstante*, which sets the prerogative above the law, was effectually demolished by the Bill of Rights at the Revolution, and abdicated Westminster Hall when King James abdicated the kingdom(*p*).]

By 3 & 4 Will. IV. c. 99, it was provided, that whenever any person shall be duly pricked or nominated to be sheriff of any county (except the county palatine of Lancaster), the same shall be forthwith notified in the London Gazette, and a warrant made out and signed by the clerk of the privy council, and transmitted to the person so appointed, and the appointment of sheriff thereby made shall be as valid to all intents as if it had been made by patent under the great seal, as formerly.

[Sheriffs, by virtue of several old statutes, are to con-

(*l*) See 24 Geo. 2, c. 48, s. 12, prior to which Act the judges met for this purpose on the morrow of *All Souls*. Blackstone remarks (vol. i. p. 341) that our custom of the twelve judges (for such in his time was their number) proposing *three* persons, seems borrowed from the Gothic constitution, cited sup. p. 625, n. (*g*), with this difference, that among the

Goths the twelve nominors were first elected by the people themselves.

(*m*) By 8 & 9 Vict. c. 11, the manner of assigning and appointing sheriffs in *Wales* shall be the same as in England.

(*n*) 1 Bl. Com. p. 342.

(*o*) Dy. 225, 226.

(*p*) Bl. Com. ubi sup.; see 2 Inst. 559.

[time in their office no longer than one year (*q*); and yet it hath been said that a sheriff may be made *durante bene placito*, or during the king's pleasure (*r*); and so is the form of the appointment (*s*). Therefore, till a new sheriff be named his office cannot be determined, unless by his own death or the demise of the crown. We may further observe, that by 1 Ric. II. c. 11, no man that has served the office of sheriff for one year, can be compelled to serve the same again within three years after; if there be other sufficient person within the county.] But the discharge of the office is, in general, compulsory upon the party chosen, and if he refuses to serve, having no legal exemption, he is liable to indictment or information (*t*); and it is said that no man can be exempt from this office but by act of parliament or letters patent, though, on the other hand, there are several causes of *disability*, such as outlawry and the like (*u*).

Also by 13 & 14 Car. II. c. 21, no person shall be assigned for sheriff unless he have sufficient lands within the same county to answer the king and his people: and this is the only qualification required for the office. That it was the intention however of our ancestors that the lands of a sheriff should be considerable, appears from their having this provision so frequently repeated, and that at the same time when they obtained a confirmation of *Magna Charta* and their most valuable liberties (*x*). As the sheriff, both in criminal and civil cases, may have the custody of men of the greatest property in the

(*q*) By 3 & 4 Will. 4, c. 99, s. 7, he shall, on expiration of his office, deliver to his successor a correct list of all prisoners in his custody, and of all unexecuted process.

(*r*) 4 Rep. 32 b.

(*s*) Dalt. Of Sheriffs, 8.

(*t*) 9 Rep. 46; *Harrison v. Evans*, 2 Burn, E. L. 185; *R. v. Woodrow*, 2 T. R. 731.

(*u*) *Watson on the Office and*

Duty of a Sheriff, p. 5. It has been said, indeed, that militia officers and practising barristers and attorneys are not liable to serve. But as to the former, see 2 & 3 Viet. c. 59, and as to the latter, *Mayor of Norwich v. Bury*, 4 Beav. 2114.

(*x*) See 9 Edw. 2, st. 2; 2 Edw. 3, c. 4; 4 Edw. 3, c. 9; 5 Edw. 3, c. 4.

country, his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight. In antient times, accordingly, this office was frequently executed by the nobility and persons of the highest rank in the kingdom; though it is now committed, in general, to commoners (*d*).

The powers and duties of the sheriff are various, and are chiefly as follows:—

1. He is charged with duties, to which sufficient reference has been made in another place (*e*), in regard to parliamentary elections, and he has also to hold a county court for the election of coroners, the proclamation of outlawries and the like (*f*). To the sheriff also, formerly, by 3 & 4 Will. IV. c. 42, might be directed writs for the trial of issues out of the superior courts in certain cases, but by a recent enactment (30 & 31 Vict. c. 142, s. 6), he has been relieved from this burthen (*g*).

2. [In his character as keeper of the king's peace both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office (*h*). He may apprehend and commit to prison all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the peace. He may, and is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for

(*d*) Christian's Blackstone, vol. i. p. 346 (n.), cites Spelm. Gloss. Vicecom. It is added, that bishops were not unfrequently sheriffs.

(*e*) Vide snp. pp. 355, 370.

(*f*) See *The Queen v. Diplock*, Law Rep., 4 Q. B. 549. The county court held for this purpose by the sheriff, must not be confounded with

the county courts established in the year 1846 by 9 & 10 Vict. c. 95.

(*g*) The sheriff has also a judicial power (exercised in the person of the under-sheriff, called in *London* the *Secondary*) in the assessment of damages under writs of inquiry on interlocutory judgments.

(*h*) 1 Roll. Rep. 237.

[this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatûs*, or power of the county (*i*); and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning (*k*), under pain of fine and imprisonment (*l*).]

3. The sheriff is also bound to execute process issuing from the superior courts of justice; and to attend on the judges when they come into the county at the assizes (*m*), and in these functions he is considered as an officer of those courts. In civil causes, supposing the case to be such that an order issues for the arrest and imprisonment of the defendant under the provisions of the Debtors Act, 1869, in order to prevent his quitting England and so prejudicing the plaintiff in the prosecution of his action, he is to effect the arrest and take the prescribed security that he will not quit England without leave of the court (*n*); and in any action, when the cause comes to trial, he must summon and return the jury: and when it is determined, he must see the judgment of the court carried into execution (*o*). And in all these matters he is liable, like other ministerial officers, to an action for the negligent or improper discharge of his duty, at the suit of the party grieved (*p*). In criminal matters, also, he returns the

(*i*) Dalt. c. 95.

(*k*) Lamb. Eiren. 315.

(*l*) St. 2 Hen. 5, c. 8.

(*m*) If necessary the sheriff must attend with javelin men to keep order. But by 22 & 23 Vict. c. 32, the magistrates of the county may, if they think fit, direct order to be kept thereat by the county police instead.

(*n*) Sec 32 & 33 Vict. c. 62, s. 6. Vide post, bk. V. c. VIII.

(*o*) As to fees and poundage payable to the sheriff on the execution

of civil process, see 29 Eliz. c. 4; 7 Will. 4 & 1 Vict. c. 55; 5 & 6 Vict. c. 98, s. 31. See also the following cases: Maybery v. Mansfield, 9 Q. B. 754; Wrightup v. Greenacre, 10 Q. B. 1; Burton v. Lawrence, 1 L. M. & P. 668.

(*p*) See Barrack v. Newton, 1 Q. B. 525; Foster v. Cookson, *ibid.* 419; Squire v. Huetson, *ibid.* 308; Gordon v. Laurie, 9 Q. B. 60. See also 5 & 6 Vict. c. 98, s. 31; 28 & 29 Vict. c. 126, s. 60.

jury; and he executes the sentence of the court, when it extends to death itself (*q*).

[Owing to the nature of the duties last referred to the sheriff, though, as we have seen, the principal conservator of the peace in his county, yet, by the express directions of the Great Charter (*r*), he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown; or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office (*s*); for this would be equally inconsistent, he being in many respects the servant of the justices.]

It is also to be observed, that though the sheriff's authority extends in general over the whole of his county, yet there exist many *liberties* therein exempt from his jurisdiction (*t*); these being districts in regard to which grants have been antiently made by the crown to individuals, conferring on them or their bailiffs the exclusive privilege (or franchise) of executing legal process therein (*u*). When it becomes necessary to execute a writ within such

(*q*) It is to be noticed that by the effect of a modern statute (the 28 & 29 Vict. c. 126, as to which, vide post, bk IV. pt. III. c. VI.), it is now *only* in respect of a person sentenced to death that the sheriff has any jurisdiction or responsibility in regard to *criminals*. Such are now deemed, as the general rule, to be in the legal custody of the *gaoler*, though the responsibility of the sheriff with regard to judgment debtors, and also his jurisdiction and responsibility with regard to prisoners

under sentence of death, and as to the carrying out of their execution, is still retained (sects. 58, 60).

(*r*) Cap. 17.

(*s*) 1 Mar. sess. 2, c. 8.

(*t*) Any town being a county of itself is also exempt, in general, from the jurisdiction of the county within which it is situate. Such county corporate has a sheriff of its own.

(*u*) 2 Bl. Com. 37. See 5 Geo. 2, c. 27, s. 3.

a liberty, the course is to direct it to the sheriff of the county as in ordinary cases; but as to the *execution* of it, that belongs by law to the bailiff of the liberty,—unless, indeed, the writ be framed with a clause of *non omittas*, (as it is called,) specially authorizing the sheriff to enter. And as such clause is now usually, and in the more ordinary writs invariably, inserted, the practical importance of these exemptions from the general jurisdiction of the sheriff is proportionably reduced (*x*).

4. [It is, further, the sheriff's business as the king's bailiff to preserve the rights of the crown within his bailiwick, for so his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory was divided into bailiwicks, as that of England into counties (*y*). He must seize to the sovereign's use all lands devolved to the crown by escheat for want of heirs (*z*); must levy all fines and forfeitures (*a*); and must seize and keep all waifs, wrecks, estrays (*b*), and the like,—unless they be granted to some subject (*c*).

To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, a deputy, bailiffs and gaolers; and these must neither buy, sell nor farm their offices, on forfeiture of 500*l.* (*d*).]

Thus by 3 & 4 Will. IV. c. 99, it is provided, that every sheriff shall, within one calendar month next after the notification of his appointment in the Gazette, by writing

(*x*) *Carrett v. Smallpage*, 9 East, 330. Moreover, by 13 & 14 Vict. c. 105, a *liberty* may now, on petition to the Crown by the Court of Quarter Sessions, be made to merge for the future in the general county jurisdiction.

(*y*) *Fortesc. de Leg.* c. 24.

(*z*) As to escheat, vide sup. vol. I. p. 435.

(*a*) See 3 & 4 Will. 4, c. 99, s. 31; sup. p. 550.

(*b*) As to waifs, wrecks and estrays, vide sup. p. 539 et seq.

(*c*) *Dalt.* c. 9. See 3 & 4 Will. 4, c. 99, as to the regulations for auditing the sheriff's accounts, &c. The sheriff was formerly also charged with the duty of collecting the king's rents within the bailiwick, but is relieved from it by the statute just mentioned (sect. 12).

(*d*) Stat. 3 Geo. 1, c. 15.

under his hand, nominate some fit person to be his *under-sheriff*, and transmit a duplicate thereof to the clerk of the peace, to be by him filed among the records of his office.

And, again, by 3 & 4 Will. IV. c. 42, every sheriff is directed to appoint a sufficient *deputy* (having an office within a mile of the Inner Temple Hall) for the receipt of writs, granting warrants thereon, making returns thereto, and accepting all rules and orders made as to the execution of any process or writ directed to the sheriff(*f*).

The under-sheriff usually performs all the duties of the office of sheriff; except a few where the personal presence of the high sheriff is necessary. But this inferior minister is only to a certain extent recognized by the law; which holds the sheriff himself civilly responsible for all acts done or omitted by his under-sheriff(*g*); and even considers the latter, where the duty is improperly performed, as exempt from any action for negligence at the suit of the party grieved(*h*). It is enacted that no under-sheriff shall abide in his office above one year(*i*); and if he does, by statute 23 Hen. VI. c. 7, he was made to forfeit 200*l.*, a very large penalty in those early days(*k*). It is also provided, by 3 Geo. I. c. 15, s. 8, that if the sheriff shall die, the under-sheriff shall continue in his office until a new high sheriff be appointed.

[Bailiffs or sheriffs' officers(*l*) are either *bailiffs of hun-*

(*f*) The delivery of a writ to the deputy, is a delivery to the sheriff. (*Woodland v. Fuller*, 11 A. & E. 859.)

(*g*) As to this liability, see the authorities cited, vide sup. p. 629, n. (*p*).

(*h*) *Cameron v. Reynolds*, Cowp. 403.

(*i*) Stat. 42 Edw. 3, c. 9.

(*k*) It was formerly prohibited to under-sheriffs and sheriffs' officers to practise as attorneys; (stat. 1

Hen. 5, c. 4;) but the prohibition is repealed by 6 & 7 Vict. c. 73.

(*l*) Besides the *sheriff's bailiffs* and *bailiffs of liberties* (vide sup. p. 630), there are also *bailiffs of the county courts* (as to whom see 9 & 10 Vict. c. 95, ss. 31–34; 12 & 13 Vict. c. 101, s. 10; 13 & 14 Vict. c. 61, s. 4; 19 & 20 Vict. c. 108, ss. 14, 16, 55, 60, 83, 84; 30 & 31 Vict. c. 112, s. 30; General Rules for the County Courts, 1867, rr. 21–35); and there are also the *bailiffs*

[*dreds* or *bound* bailiffs (*m*). Bailiffs of hundreds are appointed over those respective districts, by the sheriffs, to collect fines therein, and summon juries; to attend the judges and justices at the assizes and quarter sessions; and also to execute writs and processes in the several hundreds (*n*). But, as these are generally plain men, and not thoroughly skilled in this latter part of their office,—that of serving writs and making arrests and executions,—it is now usual to join other bailiffs with them; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey. The sheriff being civilly responsible for the official misdemeanors of these bailiffs (*o*), they are therefore annually bound to him in an obligation with sureties for the due execution of their office; and thence are called bound-bailiffs, which the common people have corrupted into a much more homely appellation.] It is to be observed, however, that besides these officers the sheriffs may appoint, at the application of a party in a civil suit, persons named by such party, for the purpose of executing some particular process therein. Persons so appointed are called *special* bailiffs; and whenever a party thus chooses his own officers, it is held to discharge the sheriff from all responsibility for what is done by them in the execution of the process (*p*).

Gaolers are also the servants of the sheriff, and (in civil cases) he is responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant: and, if they suffer any such to escape, the sheriff shall answer it, in a civil case,

of inferior courts generally; (as to whom, see 7 & 8 Vict. c. 19; *Braham v. Watkins*, 16 Mee. & W. 77; *Tarrant v. Baker*, 14 C. B. 199.)

(*m*) Called by Blackstone “special,” as well as “bound” bailiffs.

(*n*) As to bailiffs’ fees, see *Walbank v. Quarterman*, 3 C. B. 94.

(*o*) *Drake v. Sykes*, 7 T. R. 113; *Barsham v. Bullock*, 10 A. & E. 23.

(*p*) See *Ford v. Leche*, 6 Ad. & El. 699; *Balson v. Meggat*, 4 Dowl. 557; *Alderson v. Davenport*, 13 Mee. & W. 42; *Botten v. Tomlinson*, 16 L. J. (C. B.) 138.

to the party injured (*r*); on which account the gaoler of any prison in which debtors are confined is required by 28 & 29 Viet. c. 126, s. 59, to give security to the sheriff for their safe custody. And, so if a criminal should escape, the sheriff was formerly answerable to the crown, but by the Act just mentioned he is made no longer liable for the escape of any prisoner other than a debtor (*s*). The abuses of gaolers are repressed, and the treatment of their prisoners regulated, by many useful enactments, which we shall have occasion to notice in another place (*t*).

[The vast expense which custom had introduced in serving the office of high sheriff at one period grew to such a burthen to the subject, that it was enacted by statute 13 & 14 Car. II. c. 21, that no sheriff (under the penalty of 200*l*.) shall keep any table at the assizes except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery: yet, for the sake of safety and decency, he may not have less than twenty men in England and twelve in Wales (*u*).

II. The office of the Coroner is also a very antient one at the common law (*x*). He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the sovereign is more immediately concerned (*y*). And in this light, the lord chief justice of the Queen's Bench is the principal coroner in the kingdom; and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm (*z*). But there are also particular coroners for every county in England; usually four, but sometimes six, and some-

(*r*) Dalt. c. 118; Mitton's case, 4 Rep. 34.

(*s*) Sect. 60.

(*t*) Vide post, bk. IV. pt. III. c. VI.

(*u*) London, Westmoreland and counties corporate are excepted from

this Act.

(*x*) See Jervis on the Office and Duties of Coroners; Com. Dig. Officer, G.

(*y*) 2 Inst. 31; 4 Inst. 271.

(*z*) 4 Rep. 57.

[times fewer (*a*). This officer is of equal antiquity with the sheriff (*b*); and was ordained with him to keep the peace, when the earls gave up the wardship of the county.

The coroner is chosen by the freeholders at a county court held for that purpose,—as by the policy of our antient laws were the sheriffs themselves, the conservators of the peace, and all other officers who were concerned in matters that affected the liberty of the people (*c*); and as were also the verderers of the forest, whose business it was to stand between the prerogative and the subject in the execution of the forest laws (*d*). For this purpose there is a writ at common law, *de coronatore eligendo* (*e*): in which it is expressly commanded the sheriff “*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*” And in order to effect this more surely, it was enacted by the statute of Westminster the first (*f*), that none but lawful and discreet knights should be chosen as coroners, and there was an instance in the fifth year of Edward the third, of one being removed from his office because he was merely a merchant (*g*). But subsequently it was thought sufficient (*h*) if a man had lands enough to be made a knight, that is, lands to the amount of 20*l.* per annum (*i*); a qualification very inadequate in modern times to the object.] And accordingly at one period it was made matter of complaint that the office of coroner was no longer undertaken by gentlemen of property; and that though formerly no coroner would condescend to be paid for serving their country, they now only desired to be chosen for the sake of the perquisites (*k*). In our own times, however, the

(*a*) F. N. B. 163.

(*b*) *Mirroure*, c. 1, s. 3.

(*c*) 2 Inst. 558.

(*d*) *Vide sup.* vol. I. p. 665.

(*e*) F. N. B. 163. See 23 & 24
Vict. c. 116, s. 9.

(*f*) 3 Edw. 1, c. 10.

(*g*) 2 Inst. 32.

(*h*) F. N. B. *ubi sup.*; see Com.
Dig. Officer, G. 4.

(*i*) *Vide sup.* vol. I. p. 189.

(*k*) 1 Bl. Com. p. 348.

coroners are in general persons of unquestionable respectability, and their position in life such as to cast no discredit on the employment.

By 7 & 8 Vict. c. 92 (*l*), coroners may be appointed for *districts* within counties, instead of for the county at large, if it shall have been duly divided into several districts for such purpose; and by this Act, as well as by 23 & 24 Vict. c. 116, provisions are made as to the manner of their election (*m*); and, by the latter statute, all former provisions for the remuneration of county coroners by fees, mileage and allowances are repealed, and in lieu thereof they are to be paid by salary (*n*); and if any coroner shall refuse or neglect to hold an inquest, it shall be lawful for the attorney-general to apply to the Queen's Bench, for a rule calling on him to show cause why such inquest should not be held (*o*). With respect to the election of coroners, however, it is to be observed that the crown, and certain lords of franchises having a charter from the crown for that purpose, may appoint coroners for certain precincts or liberties, by their own mere grant, and without election (*p*); and that by 5 & 6 Will. IV. c. 76, ss. 62, 64, the council of every borough in which a separate court of quarter session shall be holden, shall appoint a fit person to be coroner for the borough; but in other boroughs, the coroner for the county at large is to act (*q*).

[The coroner is chosen for life; but may be removed by being made sheriff, which is an office incompatible with the other: or by the writ *de coronatore exonerando*, for a cause to be therein assigned; as that he is engaged in other business, is incapacitated by years or sickness,

(*l*) This Act repeals the 58 Geo. 3, c. 95. (See *Queen v. Lechmere*, 16 Q. B. 284.)

(*m*) See *The Queen v. Diploek*, Law Rep., 4 Q. B. 549. As to the election of the coroners for the counties of Durham and Chester, see 7 Will. 4 & 1 Vict. c. 64, and

23 & 24 Vict. c. 116, s. 7.

(*n*) Sect. 3. This provision does not extend to any but *county* coroners.

(*o*) Sect. 5.

(*p*) Sect. 9.

(*q*) See *Queen v. Grimshaw*, 16 Q. B. 747.

[hath not a sufficient estate in the county, or lives in an inconvenient part of it (*r*).] And by 25 Geo. II. c. 29, and 23 & 24 Vict. c. 116, s. 6, extortion, neglect, inability or misbehaviour are also made causes of removal (*s*).

By 6 & 7 Vict. c. 83, reciting that at the time of that Act passing, the coroners of boroughs and liberties were empowered by law to appoint *deputies* to act in their stead in certain cases, but that the coroners of counties were not,—it is provided that it shall be lawful for every coroner of a county, city, riding, liberty, or division, by writing under his hand and seal, to appoint from time to time a proper person (to be approved by the lord chancellor) to act for him as his deputy in the holding of inquests, during his illness or absence from any lawful or reasonable cause (*t*).

[The office and power of a coroner are either judicial or ministerial, but principally *judicial*. This is in great measure ascertained by statute 4 Edward I., *de officio coronatoris*: and consists, first, and principally, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death.] When such a death happens, it is the duty of the township to give notice of it to the coroner (*u*); upon which he is to issue a precept to the constables of the four, five, or six next townships, to return a competent number of good and lawful men to appear before him at such a place, to make an inquisition concerning the matter. This inquisition must be held before the coroner as presiding officer, and the court held before him on this occasion is a court of record (*x*). The jury—who must consist of

(*r*) F. N. B. 163, 164. See *Ex parte Parnell*, 1 Jac. & Walk. 451.

(*s*) See *Re Ward*, 30 L. J. 775 (Ch.).

(*t*) As to what is a "lawful and reasonable cause," see *R. v. Perkin*, 7 Q. B. 165. As to a deputy coroner,

see also *Ex parte Deputy Coroner for Middlesex*, 6 H. & N. 501.

(*u*) See *R. v. Justices of Kent*, 11 East, 230.

(*x*) 4 Inst. 271. As to the right of the public to be present, see *Garnett v. Ferrand*, 6 B. & C. 626.

twelve at least (*z*)—are to be sworn and charged by the coroner, to inquire how the party came by his death (*a*). [The inquisition must be had *super visum corporis*; for if the body be not found, the coroner cannot sit, except by virtue of a special commission issued for the purpose (*b*). By the common law he was also to sit at the very place where the death happened, though not necessarily at the same place where the body was viewed; for the jury might adjourn elsewhere to see the body, if found more convenient (*c*).] But now, by 6 & 7 Vict. c. 12,—reciting that it often happens that it is unknown where persons lying dead have come by their deaths, and also that such persons may die in other places than those in which the cause of death happened,—it is provided, that the coroner only within whose jurisdiction the body shall be *lying dead*, shall hold the inquest, though the cause of death may not have arisen within his jurisdiction. And that in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, (where there shall be no deputy coroner for the jurisdiction of the admiralty of England,) the inquest shall be held only by the coroner having jurisdiction in the place where the body shall be first brought to land (*d*). And further, that, for the purpose of inquests, every detached part of a county, riding or division, shall be deemed to be within that county, riding or division by which the same is wholly surrounded; or where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the largest common boundary.

Upon this inquisition the coroner and jury must hear such evidence as is offered, either on the part of the crown, or of any party suspected; and it is to be given

(*z*) 2 Hale's P. C. 59.

(*a*) Ibid. 60.

(*b*) 2 Hale's P. C. 58; 2 Hawk. c. 9, s. 23; R. v. Ferrand, 3 B. & Ald. 260.

(*c*) 2 Hawk. P. C. c. 9, s. 25; R. v. Great Western Railway Company, 3 Q. B. 340.

(*d*) R. v. Hinde, 5 Q. B. 944; R. v. Ellis, 2 Car. & Kir. 470.

upon oath (*e*). By 6 & 7 Will. IV. c. 89, it is moreover provided, that whenever it shall appear to the coroner that the deceased was attended at his death, or during his last illness, by any legally qualified medical practitioner, he may order his attendance as a witness at the inquest; and, where the deceased was not so attended, the attendance of any legally qualified medical practitioner, being at the time in actual practice in or near the place where the death happened. He may also direct the performance of a *post mortem* examination, with or without an analysis of the contents of the stomach or intestines; provided however, that if a sworn statement be made to him of the belief of the party sworn, that the death was caused entirely or in part by the improper or negligent treatment of any person, such person shall not be allowed to perform or assist at the *post mortem* examination. It is also enacted, that when it shall appear to the majority of the jury that the cause of death has not been satisfactorily explained by the witnesses in the first instance, they may name to the coroner, in writing, any other legally qualified practitioner or practitioners, and require their attendance as witnesses, or for the performance of a *post mortem* examination, whether one shall have been previously performed or not. And further, that all such medical witnesses shall be allowed remuneration for their attendance and trouble; and on the other hand shall forfeit 5*l.* for every neglect to obey an order for their attendance; with a proviso, however, that in case of death in any hospital, infirmary, or lunatic asylum, no remuneration shall be allowed to any person whose duty it was to attend the deceased as a medical officer of the institution.

The verdict must be found with the concurrence of at least twelve of the jury (*f*), and provisions are made by

(*e*) *R. v. Scorey*, 1 Leach, C. C. 50; 2 Hale's P. C. 62.

(*f*) See 2 Hale's P. C. 161; *Lambert v. Taylor*, 4 B. & C. 148. By

6 & 7 Vict. c. 83, to prevent the inquisition from being quashed on account of merely technical defects (*h*). [If any person be found guilty thereby of murder or other homicide, the coroner is to commit him to prison for further trial, and he must certify the inquisition, under his own seal and the seals of the jurors, together with the evidence thereon, to the Queen's Bench, or the next assizes (*i*).] Moreover, by 7 Geo. IV. c. 64, s. 4, the coroner, upon every inquisition before him taken, whereby a person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence or so much thereof as shall be material (*k*); and shall have authority to bind by recognizance all who know or declare any thing material touching such offence, to appear at the court at which the trial is to be, either to prosecute or to give evidence against the party charged: and shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition; and deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court (*l*). And by 22 Vict. c. 33, if, on the in-

6 & 7 Will. 4, c. 86, s. 5, and 21 & 22 Vict. c. 25, s. 5, the coroner is directed, after the inquest, to inform the "registrar of deaths" for the district of the finding of the jury as to the particulars of death required to be registered.

(*h*) As to the form of the inquisition, and the objections that may arise thereto, see *R. v. Evett*, 6 B. & C. 247; *In re Culley*, 5 B. & Ad. 230; *Ex parte Daws*, 8 A. & E. 936. See also 6 & 7 Will. 4, c. 89; 21 Vict. c. 25, s. 5.

(*i*) Stat. 33 Hen. 8, c. 12; 1 & 2 Phil. & Mary, c. 13; 2 West. Symb. s. 310; *Crompt. 264*; *Tremain's P. C.* 621. As to a *second* inquisition, see *Reg. v. White*, 6 Jur. (N. S.) 750. It may be worth remark, that

it is not usual that the trial of a person charged with murder shall actually take place on the coroner's inquisition. An *indictment* charging the murder is, in practice, laid before the grand jury at the same assizes to which that inquisition is returned, and if a "true bill" is found, the person accused is tried on such indictment: and if acquitted thereon (or if the bill is not found by the grand jury) no evidence is commonly adduced by the crown in support of the coroner's inquisition.

(*k*) See *Reg. v. McIntosh*, 32 L. T. 146 (Q. B.)

(*l*) In cases of suicide, when the coroner's jury returned a verdict that the person died *felo de se*, it

quiry before the coroner, a verdict of manslaughter against any person shall be found, the coroner may at his discretion accept sufficient bail for the person so charged, for his appearance to take his trial at the next assize and general gaol delivery for the county (*m*).

It may be noticed here that, by the Capital Punishment Amendment Act, 1868 (31. Vict. c. 24), the coroner of the jurisdiction to which the prison belongs, wherein judgment of death is executed on any offender, is expressly required to hold an inquest on the body within twenty-four hours after the execution, and to inquire thereat into and ascertain the identity of the body, and whether the judgment was duly executed on the offender; and it is directed that at such inquest neither any officer of the prison, nor any prisoner confined therein, shall be a juror (*n*).

[Another branch of the coroner's office is to inquire concerning shipwrecks, and certify whether wreck or not, and who is in possession of the goods (*o*). Concerning treasure trove, he is also to inquire who were the finders, and where it is; and whether any one be suspected of having found and concealed a treasure (*p*).

The coroner is also a conservator of the king's peace, and becomes a magistrate by virtue of his appointment,

was at one time customary for the coroner to direct that the remains should be interred in some public highway, a stake being previously driven through the body. But this barbarous usage is now at an end; it being directed by 4 Geo. 4, c. 52, that such persons shall be privately interred in the usual churchyard or burial place; but between the hours of nine and twelve at night, and without the rites of Christian burial.

(*m*) As to the expenses of the inquest (including the payments to the medical witnesses), they are paid

out of the county or borough rate according to a scale settled by the justices at quarter sessions. See 7 Will. 4 & 1 Vict. c. 68, ss. 2, 3.

(*n*) 31 Vict. c. 24, s. 5. As to this Act, vide post, bk. VI. ch. IV.

(*o*) As to wreck, vide sup. p. 540.

(*p*) "That may be well perceived," saith the old statute of Edward the first, "where one liveth "riotously, haunting taverns, and "hath done so of long time." (1 Bl. Com. 349.) As to treasure trove, vide sup. p. 546.

[having power to cause felons to be apprehended, whether an inquisition had been found against them or not(*r*).

The *ministerial* office of the coroner is only as the sheriff's substitute in executing process. For when just exception can be taken to the sheriff for suspicion of partiality, as that he is himself interested in the suit, or of kindred to either plaintiff or defendant,—the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writ(*s*).

III. The next species of subordinate magistrates that we are to consider, are Justices of the Peace: the principal of whom is the *custos rotulorum*, or keeper of the records of the county(*t*). The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And, therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold: others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii* still continue; but the latter sort are superseded by the modern justices.

The king is by his office and dignity royal the principal conservator of the peace within all his dominions(*u*); and may give authority to any other to see the peace kept, and to punish such as break it: hence it is called the king's peace(*x*). The lord chancellor or keeper; the lord treasurer; the lord high steward of England; the lord mareschal and the lord high constable of England, (when any such officers are in being); and the judges

(*r*) Jervis on Coroners, 2nd ed. p. 30.

(*s*) 4 Inst. 271.

(*t*) As to the *custos rotulorum*,

see Harding v. Pollock, 6 Bing. 25; 4 Bl. C. 272.

(*u*) Lambard, Eirenarch, 12.

(*x*) Vide sup. p. 504.

[of the Queen's Bench (by virtue of their offices); and the master of the rolls (by prescription);—are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it (*y*) The coroner is also, (as we have seen,) a conservator of the peace within his own county (*z*), as is also the sheriff (*a*); and both of them may take a recognizance or security for the peace. Constables, tithing men, and the like, are also conservators of the peace within their own jurisdiction; and may apprehend all breakers of the peace, and commit them till they find sureties for their keeping it (*b*).

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription (*c*); or were bound to exercise it by the tenure of their lands (*d*); or, lastly, were chosen by the freeholders in full county court before the sheriff,—the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis*" (*e*). But when Queen Isabel, the wife of Edward the second, had contrived to depose her husband by a forced resignation of the Crown, and had set up his son Edward the third in his place, this being a thing then without example in England, it was feared would much alarm the people; especially as the old king was living, though hurried about from castle to castle, till at last he met with an untimely death. To prevent therefore any risings or other disturbance of the peace, the new king sent writs to all the sheriffs in England,—the form of which is preserved by Thomas Walsingham,—giving a plausible account of the manner of his obtaining the Crown (*f*); to wit, that it was done *ipsius patris bene placito*; and withal commanding each sheriff that the

(*y*) Lamb. 12.

(*z*) Britton, 3; vide sup. p. 641.

(*a*) F. N. B. 81.

(*b*) Lamb. 14.

(*c*) Ibid. 15.

(*d*) Ibid. 17.

(*e*) Ibid. 16.

(*f*) Hist. A.D. 1327.

[peace be kept throughout his bailiwick, on pain and peril of disinheritance, and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament, that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors, should be *assigned* to keep the peace (*g*). And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the king (*h*); this assignment being construed to be by the king's commission (*i*). But still they were only called conservators, wardens, or keepers of the peace, till the statute 34 Edw. III. c. 1, gave them the power of trying felonies; when they acquired the more honourable appellation of justices (*k*).

The justices of the peace for the county are usually selected on the recommendation of the lord lieutenant (*l*), and are appointed by special commission under the Great Seal, the form of which was settled by all the judges, in the year 1590, and continues with little alteration to this day (*m*). This appoints them all, jointly and severally, to keep the peace in the particular county named (*n*):

(*g*) 1 Edw. 3, st. 2, c. 16.

(*h*) Lamb. 20.

(*i*) 4 Edw. 3, c. 2; 18 Edw. 3, st. 2, c. 2.

(*k*) Lamb. 23; 36 Edw. 3, st. 1, c. 12. As to the origin of the justices of peace, see Hist. Eng. Law, by Reeves, vol. ii. p. 472; vol. iii. pp. 216, 242, 265, 290; vol. iv. p. 154. See also *Harding v. Pollock*, 6 Bing. 25.

(*l*) As to the justices in *boroughs* (whose office within their borough is for the most part similar to that of the county justices within their county), vide post, bk. IV. pt. III. ch. I. As to the justices in and near the metropolis, (and the com-

missioners and assistant commissioners, receiver and constables of the *police* of the metropolis,) see 2 & 3 Vict. c. 47, c. 71; 3 & 4 Vict. c. 84; 11 & 12 Vict. c. 42, s. 29; c. 43, s. 33; 17 & 18 Vict. c. 94 (sched. B); 18 & 19 Vict. c. 126, s. 245; 19 & 20 Vict. c. 2; 23 & 24 Vict. c. 135; 24 & 25 Vict. c. 51, c. 124; 27 & 28 Vict. c. 55; 30 & 31 Vict. c. 39; 31 & 32 Vict. c. 67; 32 & 33 Vict. c. 67; 34 & 35 Vict. c. 35.

(*m*) Lamb. 43. See the form of the writ, ib. 36.

(*n*) As to the power of a county magistrate to act in *counties corporate* and other places of exclusive

[and any two or more of them to inquire of and determine felonies and other misdemeanors in such county committed; in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, *quorum aliquem vestrum* A. B. C. D. &c. *unum esse volumus*; whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person, for the sake of propriety; and no exception is now allowable, for not expressing in the form of the warrants, &c. that the justice who issued them is of the *quorum* (*o*). When any justice named in the commission intends to act under it, he sues out a writ of *dedimus potestatem* from the clerk of the crown in Chancery, empowering certain persons therein named to administer the oaths to him.] These oaths are the judicial oath and the oath of allegiance prescribed by the Promissory Oaths Act, 1868 (*p*), together with an oath of qualification as to sufficiency of estate (*q*): and having taken these, he is at liberty to act. Justices of the peace act gratuitously, receiving neither salary nor fees (*r*).

jurisdiction within the county, see 9 Geo. 1, c. 7, s. 3; 11 & 12 Vict. c. 42, s. 6. As to their jurisdiction in respect of *boroughs* within their county, see 5 & 6 Will. 4, c. 76, s. 11. As to their power in *detached parts* of other counties, see 2 & 3 Vict. c. 82; 11 & 12 Vict. c. 42, s. 7.

(*o*) 26 Geo. 2, c. 27; 7 Geo. 3, c. 21; 4 Geo. 4, c. 27.

(*p*) 31 & 32 Vict. c. 72, s. 6.

(*q*) See 18 Geo. 2, c. 20.

(*r*) Even the antient allowance which they once might claim, for the expenses of their attendance at sessions, has been now abolished by 18 & 19 Vict. c. 126, s. 21. On the other hand, in certain populous districts, viz., in the metropolis and elsewhere, it has become the practice to appoint paid (or *stipendiary*) magistrates, and generally with additional powers. As to these magistrates, see 2 & 3 Vict. c. 71, s. 9; 11 & 12 Vict. c. 42, s. 29; c. 43,

[Touching the number and qualification of these justices, it was ordained by statute 18 Edw. III. c. 2, that *two* or *three* of the best reputation in each county shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1, that one lord and three or four of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute 12 Ric. II. c. 10, and 14 Ric. II. c. 11, to restrain them, at first to six, and afterwards to eight in each county. But this rule is now disregarded, and the cause seems to be—as Lambard observed long ago—that the growing number of statute laws committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number(*u*). And as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county, and the statute 13 Ric. II. c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law.] Also by statute 2 Hen. V. st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties, though by 11 & 12 Vict. c. 42, s. 5, any justice of the peace for two or more adjacent counties may act in any of them, if resident in one. And because, contrary to the antient statutes above mentioned, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was afterwards enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission if he had not lands to the value of 20*l.* per annum. And the rate of money becoming greatly altered

s. 33; 17 & 18 Vict. c. 20; 18 & 19 Vict. c. 126, ss. 16, 19; 21 & 22 Vict. c. 73; 26 & 27 Vict. c. 97. As to their *deputies*, see 32 & 33 Vict. c. 34.
(*u*) Lamb. 34.

since that time, it was provided by 5 Geo. II. c. 18, and 18 Geo. II. c. 20^x, that every justice of the peace acting for a county, (with certain exceptions as therein mentioned,) must have in possession, and for his own benefit, an estate, either legal or equitable, of freehold, copyhold, or customary tenure, in fee, for life, or such term of years as in the Acts specified^y of the clear yearly value of 100*l.* (*x*); or else a reversion, or remainder expectant upon such lease as therein mentioned, with reserved rents of the clear yearly value of 300*l.* per annum (*y*).

[As the office of these justices is conferred by the crown, so it subsists only during the crown's pleasure, and is determinable, 1. By the demise of the crown: but if the same justice is put in commission by the succeeding sovereign, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh (*z*); nor, by reason of any new commission, to take the oaths more than once in the same reign (*a*). 2. By express writ under the Great Seal, discharging any particular person from being any longer justice (*b*). 3. By superseding the commission by writ of *supersedeas*; which suspends the power of all the justices, but does not totally

(*x*) Blackstone says (vol. i. p. 353, that this qualification is almost an equivalent to the 20*l.* per annum required in Henry the sixth's time, and cites Bishop Fleetwood's *Chronicon Pretiosum*.

(*y*) As to what is a sufficient qualification, see *Pack v. Tarpley*, 9 A. & E. 468; *Woodward v. Watts*, 2 Ell. & Bl. 452. Official acts done by a justice not properly qualified, are not therefore *void*, though he acts at his own peril. (*Margate Pier Company v. Hannam*, 3 B. & Ald. 266.) By 9 & 10 Vict. c. 95, s. 20, any judge of a county court,

whose name shall be inserted in the commission for the county, may act without a property qualification. By 11 & 12 Vict. c. 42, s. 31, the chief magistrate at Bow-street may act as a justice for Berks without such qualification. And by 19 & 20 Vict. c. 2, there is a similar provision as to the assistant commissioners of police of the metropolis, in their capacity of justices of the peace for Middlesex.

(*z*) 1 Geo. 3, c. 13.

(*a*) 7 Geo. 3, c. 9.

(*b*) Lamb. 68.

Mandates
387 397
c. 54.

[destroy it, seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession to the office of sheriff, which disqualifies during the year of shrievalty (*e*). It was once thought that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, this determined his office, he no longer answering the description of the commission: but afterwards it was provided, that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice (*f*).] 6. By becoming a bankrupt—it being provided by the Debtors Act, 1869, that any person assigned justice who shall be so adjudged, or who shall compound or arrange with his creditors under the Bankruptcy Act of that year, shall be incapable of acting as justice until he has been newly assigned (*g*).

[The power, office, and duty of a justice of the peace depend on the commission, and on the several statutes which have created objects of his jurisdiction. The commission, first, empowers him to conserve the peace, and thereby gives him all the power of the antient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals (*h*). It also empowers any two or more of the justices named therein to hear and determine all felonies and other offences, which is the ground of their criminal jurisdiction at *quarter sessions* (*i*), of which more will

(*e*) 1 Mar. st. 2, c. 8, vide sup. p. 630.

(*f*) 1 Edw. 6, c. 7.

(*g*) 32 & 33 Vict. c. 62, s. 22.

(*h*) The duties of the justices in regard to felons and other criminals are now mainly regulated by 11 & 12 Vict. cc. 42, 43.

(*i*) The offences to which the jurisdiction of courts of quarter sessions extends, are chiefly defined by 5 & 6 Vict. c. 38. But there are a variety of restrictions as to other offences contained in subsequent statutes. Vide post, bk. VI. ch. XIV.

[be said hereafter when we have occasion to treat of crimes and the manner of prosecution.] Besides the jurisdiction which the justices of each county at large exercise, in these and other matters, at the quarter sessions, authority is moreover given by various statutes to the justices acting for the several *divisions*, into which counties are for that purpose distributed (*k*), to transact different descriptions of business, (such as licensing alehouses or appointing overseers of the poor or surveyors of highway,) at *special sessions* (*l*). And by other Acts, two justices (or in some cases even a single one) are also empowered to try in a summary way, and without jury, such offences as in the respective statutes particularized (*m*),—the meeting together of two or more justices for which and similar purposes is denominated a *petty session* (*n*). [In these and other ways the legislature has from time to time heaped upon the justices such an infinite variety of business, that the country is greatly obliged to any worthy magistrate who, without any sinister views of his own, will engage in this troublesome service (*o*). And therefore, if a well-meaning justice

(*k*) As to county divisions for magisterial purposes, see 9 Geo. 4, c. 43; 10 Geo. 4, c. 46; 6 & 7 Will. 4, c. 12; 22 & 23 Vict. c. 65. Report of the Commissioners on County Rate, 16th June, 1836, (Appendix, part ii. p. 2.)

(*l*) As to the manner of serving notices for holding special sessions, see 7 & Vict. c. 33, s. 7.

(*m*) See particularly 7 & 8 Geo. 4, c. 30, s. 29; 10 & 11 Vict. c. 82; 11 & 12 Vict. c. 43; 13 & 14 Vict. c. 37; 18 & 19 Vict. c. 126; 19 & 20 Vict. c. 118; 24 & 25 Vict. c. 96, ss. 9, 14, 15, 17—19, 21—25, 33—37, 65, 66, 99, 105—110, 112, 120; 24 & 25 Vict. c. 97, ss. 22—25, 37—39, 41, 52, 62; 24 & 25 Vict. c. 99, ss. 23,

26, 27, 41; 24 & 25 Vict. c. 100, ss. 39, 40, 42—46, 72, 76. As to an appeal to one of the superior courts of common law, from the determination of justices on a point of law, decided on a summary conviction, see 20 & 21 Vict. c. 43; 35 & 36 Vict. c. 26.

(*n*) As to providing places for holding *petty sessions*, see 12 & 13 Vict. c. 18, and 31 Vict. c. 22. As to *petty sessional divisions* see 8 & 9 Vict. c. 10, s. 10; 12 & 13 Vict. c. 18; 18 & 19 Vict. c. 126; and 19 & 20 Vict. c. 118.

(*o*) In *R. v. Borron*, 3 B. & Ald. 433, the Court of Queen's Bench declared that the justices of the peace (acting gratuitously) were "a

[makes an undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law ;] and there are statutory provisions expressly made to protect him in the upright discharge of his office (*p*): which, among other privileges, entitle him, on being sued for any oversight, to receive notice one calendar month beforehand (*q*), and exempt him from being sued at all after the expiration of six months from the commission of the injury (*r*). He is also freed from all liability where the matter was one within his jurisdiction, unless it can be proved that he proceeded maliciously and without reasonable and probable cause(*s*). But subject to these legislative protections, a justice of the peace is liable to an action by the party injured, for illegal acts done by colour of his office (*t*). He is also liable to be prosecuted criminally, by indictment or information, if guilty of any corrupt or malicious abuse in the exercise of his judicial discretion. But, when he acts fairly and *bonâ fide*, leave will not be granted to file an information against him, on account of a mere error in his proceedings (*u*).

[It is impossible, on the plan of the present work, to enter minutely into the particulars of the accumulated authority committed to the charge of these magistrates. It will be sufficient, therefore, to refer to such subsequent parts of these Commentaries as will, in their turns, comprise almost every object of their jurisdiction: and in the

"class of persons to whom this
"country were under as great obligations as this or any other nation
"is, or ever was, to any members of
"its community."

(*p*) The principal statute now in force on this subject is 11 & 12 Vict. c. 44. See also *Leary v. Patrick*, 15 Q. B. 266; *Taylor v. Nesfield*, 3 Ell. & Bl. 724; *Gelen & Hall*, 2 H. & N. 379.

(*q*) 11 & 12 Vict. c. 44, s. 9; see *Prickett v. Gratrex*, 8 Q. B. 1020.

(*r*) Sect. 8. Actions against metropolitan police magistrates must be brought within *three* months, (2 & 3 Vict. c. 71, s. 53; *Hazeldine v. Grove*, 3 Q. B. 997; *Barnett v. Cox*, 9 Q. B. 717.)

(*s*) Sect. 1.

(*t*) *Fernley v. Worthington*, 1 Man. & Gr. 491; *Cave v. Mountain*, *ibid.* 257.

(*u*) 2 Burr. 1162; *R. v. Borron*, 3 Barn. & Ald. 432.

[meantime recommend to the reader the examination of the later editions of Dr. Burn's Justice of the Peace; where he will find every thing relating to this subject, both in antient and modern practice, collected with great care and accuracy (*x*).]

IV. The officers of whom we have hitherto spoken, though all conservators of the peace, are engaged only in the higher departments of that general duty; but we are now to examine the law relating to those inferior officers called Constables, to whom the service of maintaining the peace, and bringing to justice those by whom it is infringed, is more immediately committed (*y*).

[The word *constable* is frequently said to be derived from the Saxon *konung-ſtaþel*, and to signify the support of the king; but as we borrowed the name as well as the office of constable from the French, it seems more satisfactory to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language: wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire: so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback (*z*). This great office of lord high constable hath

(*x*) Blackstone also recommends (vol. i. p. 354) the more antient treatise, Lambard's *Eirenarcha*; which he cites as his own chief authority on the subject of justices of the peace.

(*y*) See Hawk. P. C. book ii. c. 10; Burn, by D'Oyley & Williams, *in tit.* "Constable."

(*z*) We may form a judgment of the power of the lord high constable, and the condition of the people of this country in the fifteenth century, from the following clauses in a commission, in the seventh year of

Edward the fourth, to Richard Earl Rivers: "*Plenam potestatem et auctoritatem damus et committimus ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine læsæ majestatis seu ipsius occasione, cæterisque causis quibuscunque, summarie et de plano, sine strepitu et figura judicii, soli facti veritate inspectâ.*"—Rym. Fœd. tom. xi. p. 582. And see Hist. Eng. Law, by Reeves, vol. iii. p. 194; Hallam, Mid. Ages, vol. iii. p. 223, 7th edit.

[been disused in England, except only upon great and solemn occasions, such as the king's coronation, and the like, ever since the attainder of Stafford, Duke of Buckingham, under King Henry the eighth; as in France it was suppressed about a century after, by an edict of Louis the thirteenth (*a*); but the constables of whom we now speak are supposed to have originally emanated from this high and important office (*b*).]

These constables are of two sorts, *high* constables (*c*) and *petty* constables. The former, who were first ordained by the Statute of Winchester, 13 Edw. I. st. 2, c. 6 (*d*), are appointed at the courts leet of the franchise or hundred over which they preside; or, in default of that, then by the justices at their special sessions, as directed by 7 & 8 Vict. c. 33, s. 8. The proper duty of the high constable seems to be to keep the peace within the hundred (*e*), as the petty constable does within the parish or township; for the hundred is answerable for all robberies committed therein by daylight, as this must be imputed to the negligence of their officers. And the high constables are also, by various statutes, charged with other duties; such as that of serving of precepts and warrants on certain occasions (*f*). But—the utility of these offi-

(*a*) Phillip's Life of Pole, ii. 111.

(*b*) Lambard, of Constables, 5.

(*c*) These officers are also called by Lord Coke (4 Inst. 267), *chief* constables, but that term is now differently applied. Vide post, p. 656.

(*d*) 4 Inst. 276.

(*e*) 1 Bl. Com. 356. See the ancient duties specifically enumerated, 4 Inst. ubi sup. Blackstone remarks, (ubi sup.,) that by the Statute of Winchester, the high constable is to keep *watch and ward* within his jurisdiction. "*Ward* (*custodia*)" is chiefly applied to the day time,

"in order to apprehend rioters

"and robbers on the highways."

"*Watch* is applicable to the night

"only, being called among our

"Tentonic ancestors *wacht* or *waeta*

"(see Capit. Hludov. Pii, cap. i.);

"and it begins at the time when

"ward ends."

(*f*) At one time they used to issue an annual precept to the churchwardens and overseers, directing them to make out the lists of jurors. But by 25 & 26 Vict. c. 107, this duty was imposed upon the clerk of the peace for the county.

cers having become questionable—the justices for each county were directed by 32 & 33 Vict. c. 47, to consider and determine whether it was necessary that the office of high constable of each hundred, or other like district, within their jurisdiction, should be continued. [As to the petty constables, these are inferior officers in every town and parish, subordinate to the high constable of the hundred, and have two offices united in them; the one antient, the other modern. Their antient office is that of headborough, tithing man, or borsholder; of whom we formerly spoke, and who are as antient as the time of King Alfred (*g*): their more modern office is that of constable merely; which was instituted about the reign of Edward the third, for the assistance of the high constable (*h*). Their principal duty is the preservation of the peace (*i*); though they also have other particular duties assigned to them by act of parliament, particularly the service of the summonses and the execution of the warrants of the justices of the peace, relative to the apprehension and commitment of offenders. In the execution of these warrants, the petty constable enjoys certain protections similar to some of those conferred on the justices themselves. Thus, an action cannot be brought against him for what he does in his office, after the expiration of six months from the commission of the act (*k*). In one respect, indeed, his privilege is greater than that of a magistrate: for by 24 Geo. II. c. 44, neither he nor those acting in aid of him, may be sued without making the justice, who signed the warrant, a joint defendant; and on production of such warrant at the trial of the cause, the jury shall give their verdict for the con-

(*g*) Vide sup. vol. I. p. 124.

(*h*) Lamb. 9.

(*i*) “Of the extent of the power
“of constables (says Blackstone,
“vol. i. p. 356), considering what
“manner of men are for the most
“part put into these offices, it is

“perhaps very well that they are
“generally kept in ignorance.” (See
also the Report on County Rate,
16th June, 1836.)

(*k*) See *Gosden v. Elfick* and
another, 7 D. & L. 194.

[stable, notwithstanding any defect of jurisdiction in the magistrate (*m*).]

Petty constables were formerly chosen by the jury at the court leet; or if no court leet were held, then by two justices of the peace (*n*). And, with the object of improving the character of the force which had become very inadequate to the performance of its duties, it was provided by 5 & 6 Vict. c. 109 (*o*), that the justices shall annually issue precepts to the overseers of each parish in their county (not being within any *borough* under the Municipal Corporations Act, 5 & 6 Will. IV. c. 76), requiring them to return a list of a competent number of men within such parish qualified and liable to serve as constables (*p*); in which class (generally, but subject to numerous exceptions,) is included every able-bodied man there resident, between twenty-five and fifty-five years of age, who is rated to the poor rate or county rate, or is a tenant to the value of 4*l.* per annum:—that the justices, at a special petty sessions of the peace to be holden for that purpose, shall revise such list, and choose therefrom such number of persons as they deem necessary, having regard to the extent and population of the parish; but that no person who has already served shall be liable to do so again till every other person liable shall have served, either in person or by substitute (*q*):—that every person so chosen shall serve for a year, or until another shall be appointed in his stead; and, in case of his refusal to do so, shall

(*m*) In some cases, a constable is also entitled to receive a notice of action (see 10 Geo. 4, c. 44, s. 31; 2 & 3 Vict. c. 71, ss. 41, 42, 43); in other cases, before an action is brought against a constable, a demand must first be made of a perusal and copy of the warrant under which he acted. (24 Geo. 2, c. 44, s. 6.)

(*n*) 1 Bl. Com. 356. See *R. v.*

Mosley, 3 Ad. & El. 488.

(*o*) The 5 & 6 Vict. c. 109, was extended and amended by 7 & 8 Vict. c. 52, and 13 & 14 Vict. c. 20.

(*p*) See *The Queen v. The Overseers of North Brierley*, 1 Ell. Bl. & Ell. 519.

(*q*) See 13 & 14 Vict. c. 20, s. 4. As to the substitute, see *Queen v. Booth*, 12 Q. B. 884.

incur such penalties as in the Act provided:—that fees (payable out of the poor rate) shall be allowed to the constables for services of summonses and execution of warrants, and for such other occasional services as the justices may think fit, according to a Table to be settled at quarter sessions, and approved by a secretary of state:—and that every constable appointed under the Act shall have within his county, (and also within all liberties and franchises, and detached parts of other counties situated therein, and also in every adjoining county,) all the powers and privileges, and be liable to all the duties and responsibilities, which a constable before enjoyed or was subject to within his own constablewick; but shall not be bound to act beyond his own parish without the special warrant of a justice of the peace. But inasmuch as the subsequent establishment of an efficient county police has, since this statute, rendered the appointment of parish constables in many places unnecessary, it was provided by 35 & 36 Vict. c. 92, that none such shall be appointed after the 24th March, 1873, unless for any parish in regard to which the magistrates for the county shall at their general or quarter sessions determine that it is necessary that such appointment shall be made, with a view to the preservation of the peace, or the proper discharge of the public business therein. By the previous statute (5 & 6 Vict. c. 109) it was also provided, that it shall be lawful for the justices in quarter sessions (if they think fit) to order that lock-up houses shall be provided in such places within their county as they may deem expedient; and that the expense of providing and furnishing them shall be defrayed out of the county rates. But no lock-up house shall be provided, except upon such plan as shall be approved by a secretary of state; and every such house shall be under the supervision of the inspectors of prisons (*r*).

With regard to *incorporated boroughs*, which (as above observed) are exempted from the operation of the 5 & 6

(*r*) See 13 & 14 Vict. c. 20, ss. 2, 6.

Vict. c. 109, a police (or constabulary) force is maintained in each of these for the preservation of the peace therein; and this is appointed by, and is under the superintendence of, the *watch committee* of the borough (*x*).

In addition to the parochial and borough police, there has (as above mentioned) been now also established a *county constabulary*, under the superintendence of a *chief constable*; an officer appointed by the justices of the county, subject to the approval of the secretary of state for the home department. The Acts containing the provisions on the county police are the 2 & 3 Vict. c. 93; 3 & 4 Vict. c. 88; 19 & 20 Vict. c. 69; 20 Vict. c. 2; and 22 & 23 Vict. c. 32 (*y*). And by these it is, among other things, enacted, that in every county such a force shall be established (*z*): and that the chief constable may, subject to the approbation of two or more justices in petty sessions assembled, appoint such other constables as may be required, and also a superintendent to be at the head of the constables in each division; and may at his pleasure dismiss any of them, subject to any orders from the justices in quarter sessions, and to the rules established for the government of the force (*a*). And further, that the salaries and allowances of the chief and other constables, and all expenses incurred in putting the Acts into execution, shall be paid out of a police rate to be made by the justices at quarter sessions: and that it shall be lawful for the justices of any county, and for the council of any incorporated borough situated in or adjoining to such

(*x*) 5 & 6 Will. 4, c. 76, ss. 76—82. As to the watch rate, see 7 Will. 4 & 1 Vict. c. 81, s. 3; 3 & 4 Vict. c. 28; 22 & 23 Vict. c. 32, s. 5.

(*y*) This last Act also contains provisions with regard to the *borough* police.

(*z*) 19 & 20 Vict. c. 69, s. 1. Before this provision, the establishment was optional. As to constituting se-

parate police districts in the county, in certain cases, and separate police rates, see 12 & 13 Vict. c. 65; 19 & 20 Vict. c. 96, s. 4.

(*a*) 2 & 3 Vict. c. 93, ss. 6, 7. The *petty* constables (when any are still appointed) are also placed, by 35 & 36 Vict. c. 92, under the authority of the chief constable of the county (sect. 7).

county, to agree together for the consolidation of the county and borough police establishments (*b*). And that the justices of every county—and the watch committee of each borough—shall annually transmit to the secretary of state, an account of the crime within such county or borough respectively. It is also provided that her majesty may appoint *inspectors* to report on the efficiency of the police appointed for the same (*c*): and that whenever a certificate shall be granted by the secretary of state that the police of any county (or of any borough, with a population amounting to five thousand) has been maintained, during the preceding year, in a state of efficiency as to numbers and discipline,—such sum, in aid of its expenses, may be granted by the Treasury, as shall not exceed one fourth of the charge for its pay and clothing (*d*).

Moreover, in addition to the ordinary, there are also *special* constables, who are appointed by the magistrates to execute warrants on particular occasions, or to act in aid of the preservation of the peace on special emergencies, where an increase of the existing police force appears desirable (*e*). This office, in the absence of volunteers, is compulsory; it being enacted, by 1 & 2 Will. IV. c. 41, and 5 & 6 Will. IV. c. 43, that any two justices, upon the oath of a credible witness that a tumult, riot or felony has taken place, or may be reasonably apprehended, may (if of opinion that the ordinary officers are insufficient,) appoint and swear in any persons fit for the purpose—who need not be householders or even resident within the place for which they are to act, but must be such as have no legal exemption or incapacity from serving the office of constable—to act as special constables for a limited time, for some particular parish, township or place. And in like manner, the lord lieutenant of the county may, by direction of the secretary of state, cause special constables

(*b*) 3 & 4 Vict. c. 88, s. 14. As to the police *superannuation fund*, see 19 & 20 Vict. c. 69, ss. 10, 11, 27; 22 & 23 Vict. c. 32, s. 7 et seq.;

35 & 36 Vict. c. 35.

(*c*) 19 & 20 Vict. c. 69, ss. 14, 15.

(*d*) Sects. 16, 17.

(*e*) 41 Geo. 3, c. 78.

to be appointed to act either for the whole county, or in any portion thereof. And, in either case, any privilege of exemption may, by order of government, be disallowed. The powers of a special constable, appointed under these Acts, are, as the general rule, the same as those of an ordinary constable (*f*).

Another branch of the police of the realm, closely connected with the subject under discussion, consists of *watchmen*, or guardians of the peace by night. These were antiently only the deputies or assistants of the constable, and were appointed by him (*g*). But in modern times, they have been appointed without the constable's intervention; being employed and paid by particular parishes, or sometimes by private individuals, with the view of obtaining a more effectual protection to person and property than can be otherwise afforded. The authority of watchmen, in this modern sense, is recognized by law (*h*); and by 3 & 4 Will. IV. c. 90 regulations were made for the watching and lighting of any parish desirous to adopt the provisions of the Act at their own expense (*i*). But it is not intended that a body of watchmen thus established shall, as the general rule, remain as a separate force *in addition* to the county constabulary, where this latter body is sufficient for the protection of the public. And accordingly, by 3 & 4 Vict. c. 88, s. 20, they are, as such a force, to be discontinued upon its being notified to their inspector by the chief constable of the county, that he is ready to take the charge of the place upon himself. But (by 19 & 20 Vict. c. 69, s. 19) such notice is not to be given where the population of the place amounts to fifteen thousand, without the previous authority of a secretary of state.

(*f*) As to the *payment* of special constables, in certain cases, see 1 & 2 Will. 4, c. 41, s. 13; 1 & 2 Vict. c. 80; *The Queen v. Hamilton*, Law Rep., 3 Q. B. 718; *The Queen v. Lord Newborough*, ib., 4 Q. B. 585. As to special constables in *boroughs*, see 5 & 6 Will. 4, c. 76, s. 82.

(*g*) 1 Bl. Com. 357.

(*h*) 2 Hale, P. C. 98; 3 Inst. 52; 9 Rep. 66.

(*i*) As to this Act, see *Pilkington v. Riley*, 6 D. & L. 628; *The Queen v. Deverell*, 3 Ell. & Bl. 372; *The Queen v. Overseers of King's Winford*, ibid.

BOOK IV.

OF PUBLIC RIGHTS—(*continued*).



PART II.

OF THE CHURCH.



HAVING now finished our examination of that division of public rights which concerns the relation between persons in *civil* authority, and those who are subject to that authority,—which involved the whole law relating to the *State* or *civil* government,—we are next to turn our attention to such public rights as are connected with the relation between those who have powers in matters *ecclesiastical*, and those over whom that power is exercised,—which latter subject we shall discuss, as proposed in a former place, under the general head of the *Church* (*a*).

The Church, in that sense of the term to which these Commentaries refer, may be defined as an institution established by the law of the land, in reference to religion; in treating of which we shall find it convenient to consider, first, the authorities established in the Church; secondly, the law relating to its doctrines, worship and discipline; thirdly, the law relating to its benefices or endowments; and, fourthly, the extensions of the original establishment, which have from time to time been effected. And, first, of the ecclesiastical authorities.

(*a*) Vide sup. p. 317.

CHAPTER I.

OF THE ECCLESIASTICAL AUTHORITIES.

THE supreme head of the Church (as already explained) is the sovereign, and under her the ecclesiastical authorities consist principally of the *clergy*,—a venerable body of men set apart from the rest of the people (or *laity*), in order to superintend the public worship of Almighty God and the other ceremonies of religion, and to administer spiritual counsel and instruction.

The clergy consist of such, and such only, as have been admitted into *holy orders*; which are the orders of bishops (including archbishops), priests, and deacons (*a*): and the ordination must take place according to the form prescribed in the Book of Common Prayer (*b*). By 44 Geo. III. c. 43, it is provided (conformably to the canons and the rubric prefixed to the office of ordination in that Book), that none shall be ordained deacon under twenty-three years, nor priest under twenty-four years of age;—though as to deacons, the Archbishop of Canterbury has the privilege of admitting them, (by faculty or dispensation,) at an earlier period. By the 13 Eliz. c. 12, it was

(*a*) “Bishops, Priests and Deacons
“are the ministerial orders known
“to the episcopal establishment of
“England. In the *Bishop* lies the
“power of ordination. *Deacons*,
“when ordained, may, licensed by
“the bishop, preach and administer
“the rite of baptism. *Priests*, by
“this ceremony, are further em-
“powered to administer the Lord’s
“Supper, and to hold a benefice with
“cure of souls.”—Report on the
Religious Worship of England and

Wales, December, 1853, p. xxxiv.

(*b*) See 2 Burn’s Eccl. Law, 103; Wats. C. L. ch. xiv. As to the *fees* payable on ordination, see 30 & 31 Vict. c. 135. By 59 Geo. 3, c. 60, s. 3, no person ordained by a *foreign* bishop can officiate in any church or chapel of England, without special permission from the archbishop of the Province; or be admitted to any ecclesiastical preferment in England, without consent both of archbishop and bishop.

further prescribed that none should be ordained either priest or deacon, without first *subscribing* the Thirty-nine Articles of religion. But in lieu of this, it is now provided by 28 & 29 Vict. c. 122, that before ordination the priest or deacon shall make and subscribe such declaration of *assent* to such Articles, the Book of Common Prayer, and the ordination service, as is provided in that Act,—a declaration which includes also an assertion of belief that the doctrine of the Church as therein set forth is agreeable to the Word of God, and a pledge to use the forms thereby prescribed in public worship and the administration of the sacraments (*c*). It is also requisite that the candidate shall, prior to ordination, take the oath of allegiance to the Queen (*d*), and also the oath of canonical obedience to his bishop (*e*). Moreover, by the canon law, no person shall be admitted into holy orders without a *title*; that is, unless he produce to the bishop a presentation to some ecclesiastical living within the diocese, or such certificate of preferment or provision as in the canon described; unless, indeed, he be a fellow or chaplain in Oxford or Cambridge, or master of arts of five years' standing in either of such universities, and living there at his own charge: or unless the bishop himself intends shortly to admit him to some benefice or curacy (*f*).

[In order to enable them to attend the more closely to their duties, the clergy of the established church have certain privileges: and had formerly much greater, which were abridged at the time of the Reformation, on account of the ill use which the popish clergy had endeavoured to make of them. For the laws having exempted them from almost every personal duty, they attempted a total exemp-

(*c*) 28 & 29 Vict. c. 122, ss. 1, 4.

(*d*) The form of oath is now prescribed by the 31 & 32 Vict. c. 72 (sect. 14). By 24 Geo. 3, c. 35, an *alien* may be ordained to exercise the office of deacon or priest out of

the dominions of the crown, without requiring him to swear allegiance to the sovereign of these realms.

(*e*) See 28 & 29 Vict. c. 122, s. 12; 31 & 32 Vict. c. 72, s. 14.

(*f*) Can. 33; Wats. C. L. 147.

[tion from every secular tie (*h*). But it is observed by Sir Edward Coke (*i*), that as the overflowing of waters doth many times make the river to lose its proper channel, so in times past, ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost, or enjoyed not, those which of right belonged to them. The personal exemptions do indeed, in some instances, continue. A clergyman cannot be compelled to serve on a jury (*k*); nor can he be chosen to any temporal office, as bailiff, reeve, constable, or the like—in regard of his own continual attendance on the sacred function (*l*).] During his attendance on divine service, that is to say, *cundo, morando, et redeundo*, he is privileged from being arrested in any civil suit (*m*): and the glebe and tithes of his parsonage are not liable to be seized in execution to satisfy a judgment in the same manner as lay property, but are made liable to a *sequestration*: by which process the sum due on such judgment is directed to be levied by the churchwardens out of the profits of his benefice, for the use of the creditor, but only after making provision for the service of the church (*n*). But as the clergy have

(*h*) The marriage of the clergy was, in the time of popery, prohibited; but the prohibition was taken away by 2 & 3 Edw. 6, c. 21. Among the privileges by which the clergy were once very particularly distinguished, was what was called the *benefit of clergy*, antiently allowed to them alone. As to this vide post, bk. vi. ch. XXIII.

(*i*) 2 Inst. 4.

(*k*) This exemption, and some others, extends also, in certain cases, to dissenting ministers.

(*l*) Finch, L. 88.

(*m*) See 24 & 25 Vict. c. 100, s. 36, by which enactment, to arrest a clergyman in defiance of this privilege is made a misdemeanor,

punishable with imprisonment, with or without hard labour, to the extent of two years.

(*n*) By 34 & 35 Vict. c. 45, in case of a sequestration the bishop may, after six months, appoint a curate to the benefice, and assign his stipend in a certain proportion to the population, which is to be paid by the sequestrator in priority to any other claim. The bishop may also inhibit the incumbent from performing any service in the church while the sequestration remains in force, if it appears to him that scandal or inconvenience is otherwise likely to arise. Upon the subject of sequestration generally, the following authorities may be consulted: Burn's

their privileges, so also they have their disabilities, on account of their spiritual avocations. For by 41 Geo. III. c. 63, they are made incapable of being elected members of the House of Commons(*o*); and by 5 & 6 Will. IV. c. 76, s. 28, of being councillors or aldermen in boroughs. They are also prohibited from farming or trading; for by 1 & 2 Vict. c. 106, ss. 28—30, (repealing some former enactments on this subject,) no spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or allowed to perform the duties of any ecclesiastical office,—shall take to farm for occupation by himself any lands exceeding eighty acres in the whole, without permission in writing from the bishop of the diocese; nor shall such spiritual person, by himself or any other to his use, carry on any trade or dealing for profit, unless it be carried on by more than six partners, or his share in it shall have devolved to him by inheritance, or other such representative title as in the Act specified; and even in these excepted cases it is illegal for him to act as director or managing partner, or to carry on the trade in person(*p*). But notwithstanding these prohibitions, the Act allows him to carry on the business of a school-master; or to deal with booksellers as to the sale of books; or to be a managing director, partner, or shareholder in any benefit, fire or life insurance society; or to buy or sell to the extent necessarily incidental to his lawful occupation of land, or to sell minerals, the produce of his land,—provided always, that none of such transactions be personally conducted in any market or place of public sale.

Eccles. Law, in tit. Sequestration; *Arbuckle v. Cowtan*, 3 Bos. & Pul. 326; *Marsh v. Fawcett*, 2 H. Bl. 582; *Bishop v. Hatch*, 1 Ad. & E. 171; *Pack v. Tarpley*, 9 Ad. & E. 468; *Harding v. Hall*, 10 Mee. & W. 42; *Phelps v. St. John*, 10 Exch. 895. See also as to the remedies of sequestrators, 12 & 13 Vict. c. 67.

(*o*) Vide sup. p. 367.

(*p*) See also 4 & 5 Vict. c. 14. It is to be observed, that a contract entered into by a clergyman engaged in trade, contrary to the provisions of 1 & 2 Vict. c. 106, may be nevertheless enforced against him. (*Lewis v. Bright*, 4 Ell. & Bl. 917.)

In the frame and constitution of ecclesiastical polity there are divers ranks and degrees, which we now shall consider in their respective order, merely as they are taken notice of by the secular laws of England.

I. Both *archbishops* and *bishops* are constituted by election, confirmation, consecration, and installation (*q*); though an archbishop is more properly said to be enthroned and not installed (*r*).

[The election of an archbishop or of a bishop is by the chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair, throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy (*s*), till at length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands, by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A.D. 773, by Pope Hadrian I. and the Council of Lateran, and universally exercised by other Christian princes (*t*): but the policy of the Court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy; which at length was completely effected: the mere form of election appearing to the people to be a thing of little consequence, while the

(*q*) As to archbishops and bishops, vide sup. p. 328, et vol. I. p. 116.

(*r*) Bishop of St. David's *v.* Lucy, 1 Salk. 137; 3 Salk. 72. See 5 & 6 Vict. c. 26, as to providing

episcopal houses of residence.

(*s*) *Per clericum et populum*, Palm. 25; Sobrean *v.* Kevan, 2 Roll. Rep. 102; M. Paris, A.D. 1095.

(*t*) Decret. I, dist. 63, c. 22.

[crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England, (as well as other kingdoms in Europe,) even in the Saxon times (*u*): because the rights of confirmation and investiture were in effect, (though not in form,) a right of complete donation (*v*). But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring and pastoral staff or crosier,—pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction; and Pope Gregory the seventh, towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them (*w*). This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry the fifth agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future, *per sceptrum*, and not *per annulum et baculum*,—and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier, the Court of Rome found it prudent to suspend for awhile its other pretensions (*x*).

This concession was obtained from King Henry the first in England, by means of that obstinate and arrogant

(*u*) Palm. 28.

c. 12 et 13.

(*v*) Selden, Jan. Ang. l. 1, s. 39.

(*x*) Mod. Un. Hist. xxv. 363;

(*w*) Decret. 2, caus. 16, qu. 7,

xxix. 115.

[prelate, Archbishop Anselm (*y*); but King John, (about a century afterwards,) in order to obtain the protection of the pope against the discontented barons, was also prevailed upon to give up, by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops; reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to elect (on refusal whereof the electors might proceed without it); and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause (*z*). This grant was expressly recognized and confirmed in King John's *Magna Charta* and was again established by statute 25 Edw. III. st. 6, c. 3 (*a*).

But by statute 25 Hen. VIII. c. 20 (*b*), the law was again altered, and the right of nomination secured to the Crown as it exists at the present day: it being then enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual licence (called his *congé d'élire*) to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect; and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may then by letters-patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the

(*y*) M. Paris, A.D. 1107.

(*z*) Ibid. A.D. 1214; 1 Rym. Fœd. 198.

(*a*) Cap. 1, edit. Oxon. 1759.

(*b*) Repealed by 1 & 2 Ph. & Mary, c. 8, s. 9, but afterwards revived by 1 Eliz. c. 1, ss. 7, 10. As to the bishoprics created by Hen. 8, viz., Chester, Gloucester, Peterborough, Bristol and Oxford, it is said in Co. Litt. by Harg. 134, a, n.

(5), that they are donative. But it seems to be the practice as to all these, to issue a *congé d'élire* (see *The Queen v. Archbishop of Canterbury*, 11 Q. B. 513); and in the case of Gloucester and Bristol (now united), it is expressly directed that there shall be an election by the dean and chapter of each alternately. (Order in Council, 5 Oct. 1836.)

[king's letters-patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; in either case, requiring them to confirm, invest, and consecrate the person so elected: which they are bound forthwith to perform (*c*). After which, the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this Act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*; that is, the loss of all civil rights, with forfeiture of lands, goods, and chattels, and imprisonment during the royal pleasure (*d*).]

There are two archbishops for England and Wales (*e*); the Archbishop of Canterbury, who has within his province all the bishoprics, except those of Chester, Durham, Carlisle, Ripon, Manchester, and that of Sodor and Man;

(*c*) A bishop, when consecrated, must be full thirty years of age (see the rubric prefixed to the office of ordination in the Book of Common Prayer); but antiently there seems to have been no such restriction. (See Godw. Comm. de Præsul. 693.)

(*d*) It may be here noticed that, in the year 1848, the see of Hereford being vacant, the dean and chapter thereof received a *congé d'élire* to elect Dr. Hampden, who was in due course elected; but at the time of his *confirmation*, on the usual challenge to objectors, certain objections were tendered; but the officers in ministration refused to receive them. Upon this a rule was obtained by the objectors, in the Court of Queen's Bench, to show cause why a *mandamus* should not issue to the Arch-

bishop of Canterbury to receive the objections. The judges however were equally divided in their opinions, and consequently the rule was discharged. (Queen v. Archbishop of Canterbury, 11 Q. B. 483.)

(*e*) At one time there were three archbishoprics, the third being of Caerleon in Wales; but in the time of Henry the first both that see and all Wales became subject to the Archbishop of Canterbury. (Rogers's Eccl. L. 105.) With respect to the Welch dioceses, notice may here be taken of a recent Act (26 & 27 Vict. c. 82), providing facilities for the performance of divine service in the English as well as the Welch language, when so desired by the inhabitants of any parish.

and the Archbishop of York, whose province comprises the six bishoprics just named.

Each of the archbishops, and the bishops of London, Durham, and Winchester, and twenty-one other bishops, have the right, in virtue of their respective sees, to sit as lords spiritual, (having first received a writ of summons for the purpose,) in the House of Lords. But the bishop of Sodor and Man is in no case a lord spiritual, and the bishop most recently appointed (not being one of the above three) does not receive a writ of summons to parliament until a fresh vacancy occurs among those sees which confer a seat in the House of Lords in rotation. This is by the effect of the statute 10 & 11 Vict. c. 108, for establishing the bishopric of Manchester; for, though prior to that Act all bishops (except the bishop of Sodor and Man) were summoned as a matter of course to the House of Lords, it was therein provided that the number of lords spiritual should not be increased by the creation of the new bishopric.

An archbishop is the chief of all the clergy in his province; and has the inspection of the bishops of that province, as well as of the inferior clergy, or, as the law expresses it, the power to *visit* them (*f*). He confirms the election of the bishops, and afterwards consecrates them (*g*). As archbishop, upon receipt of the king's writ, he calls the bishops and clergy of his province to meet him in Convocation; but without the king's writ he cannot assemble them (*h*). To him, as a superior ecclesiastical judge, all appeals are made from inferior jurisdictions

(*f*) Bishop of St. David's *v.* Luey, 1 Salk. 134; and see *Re Dean of York*, 2 Q. B. 1. As to the *fees* payable on the visitation, to the officials of the archbishop, see 30 & 31 Vict. c. 135 and *Veley v. Pertwee*, Law Rep., 5 Q. B. 573.

(*g*) 2 Rol. Abr. 223. As to the power of the archbishop to conse-

crate a British subject, or the subject or citizen of a foreign state, to be a bishop in a foreign country, see 5 Vict. c. 6. As to his power in relation to the bishops and archdeacons of the West Indies, see 6 Geo. 4, c. 88; 5 & 6 Vict. c. 4.

(*h*) 4 Inst. 322, 323. As to Convocation, vide sup. p. 524 et seq.

within his province (*i*). And as an appeal lies from the bishops in person, to him in person; so it also lies from the consistory courts of each diocese, to the archiepiscopal court (*h*). During the vacancy of any see in his province, the archbishop is guardian of the spiritualities thereof, as the king is of the temporalities, and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of Prior of Canterbury was abolished at the Reformation (*l*). The archbishop is entitled to present by lapse, to any ecclesiastical living in the disposal of one of his diocesan bishops, if not filled within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop (*m*); in lieu of which the bishop used to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice within the bishop's disposal, within that see, as the archbishop himself should choose. Which, therefore, was called his *option* (*n*): and was only bind-

(*i*) The *secular* jurisdiction formerly belonging to the Archbishop of York and to the Bishop of Ely was abolished by 6 & 7 Will. 4, c. 87; 7 Will. 4 & 1 Vict. c. 53; that belonging to the Bishop of Durham, by 6 & 7 Will. 4, c. 19.

(*h*) See Ex parte Denison, 4 Ell. & Bl. 292.

(*l*) 2 Rol. Abr. 22.

(*m*) Bishops are here styled *suffragan* (a word signifying *deputy*), in respect of their relation to the archbishops of their province. But at one time every bishop had also his suffragan to assist him in conferring orders, and in other spiritual parts of his office within his diocese. After having for a long period remained in abeyance, these suffragan

bishops have recently again been brought into use in some of the dioceses. These seem to resemble the *chorepiscopi*, or *bishops of the country*, in the early times of the Christian church. How this inferior order of bishops may be elected and consecrated, is regulated by 26 Hen. 8, c. 14. The suffragan bishops should not be confounded with the *coadjutors* of a bishop; the latter being appointed in case of a bishop's infirmity to superintend his *jurisdiction* and *temporalities*, neither of which is within the interference of the former. See as to this subject, 1 Gibs. Cod. 1st edit. 155; Co. Litt. by Harg. 94 a, note (3).

(*n*) Cowel's Interp., tit. Option.

ing on the bishop himself who granted them, and not on his successors; the prerogative seeming to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury (*o*). But the law of options must now be taken in connection with the provision of 3 & 4 Vict. c. 113, s. 42, whereby spiritual persons are forbidden to sell any preferment. [It is the privilege, by custom, of the archbishop of Canterbury to crown the kings and queens of this kingdom (*p*). And he has also, by the statute 25 Hen. VIII. c. 21 (*q*), the power of granting *dispensations* in any case, not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time (*r*), or his giving dispensation to hold two livings and the like (*s*); and on this also is founded the right he exercises of conferring degrees, called Lambeth degrees (*t*), in prejudice of the universities (*u*). In un-

(*o*) Blackstone remarks (vol. i. p. 283), that the papal claim itself, like most others of that encroaching see, was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces*; whereby the emperor had immemorially exercised (Goldast. Constit. Imper. tom. 3, p. 406) a right of naming to the first prebend that became vacant after his accession, in every church of the empire. (Dufresne, v. 806; Mod. Univ. Hist. xxix. 5.) He adds that a similar right was exercised in England by the sovereign in the reign of Edw. I (Brev. 11, Edw. I; 3 Pryn. 1264), which probably gave rise to the royal *corodies*; viz., the right (now disused) to send one of the royal chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promoted him to a benefice. There were also other

species of *corodies*; as to which, vide sup. vol. i. p. 649, n.

(*p*) It is said that the archbishop of York has the privilege to crown the queen consort, and also to be her perpetual chaplain. (1 Burn's Eccl. Law, 178.)

(*q*) And see 28 Hen. 8, c. 16. As to dispensation, see Colt v. Bishop of Lichfield, Hob. 147.

(*r*) See 4 Geo. 4, c. 76, s. 20.

(*s*) See 1 & 2 Vict. c. 106, s. 6, and 13 & 14 Vict. c. 98.

(*t*) Although the archbishop can confer all the degrees which are taken in the universities of Oxford and Cambridge, yet the graduates of these universities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a "Lambeth" degree.

(*u*) See the Bishop of Chester's case, Oxon. 1721.

[accustomed cases, however, the archbishop has no power to grant dispensations, but must refer the matter to the sovereign in council (*x*).]

A bishop is the chief of the clergy within his diocese (*y*); but is subordinate to the archbishop of the province, to whom indeed he is sworn to pay due obedience (*z*). His dignity is usually called a see (*sedes*), and the church of his diocese a cathedral (*a*). Among the principal powers which he exercises are those of ordaining priests and deacons (*b*), consecrating churches, and inspecting the manners of the people and clergy (*c*); for which purpose he may *visit* at pleasure every part of his diocese (*d*).

(*x*) 25 Hen. 8, c. 21, s. 5.

(*y*) As to dioceses, vide sup. vol. i. p. 116.

(*z*) See preamble to 26 Geo. 3, c. 84. A clergyman is said to owe "canonical obedience" to the bishop who ordained him, to the bishop in whose diocese he is beneficed, and also to the metropolitan of such bishop. (4 Bl. Com. 203; 1 Hale, P. C. 381.)

(*a*) As to the government and arrangement of cathedrals and collegiate churches, see 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 27 & 28 Vict. c. 70. We may remark here, that a *collegiate church* is a church consisting of a body corporate of dean and canons, such as Westminster, Windsor, &c., independently of any cathedral. The Report of the Cathedral Commission (published in 1854) divides cathedrals and collegiate churches into four classes. The first class consists of thirteen, being the *cathedrals of the old foundation*, or Ecclesiæ Cathedrales Canonicorum Secularium. The second class consists of *eight conventual cathedrals*,

constituted with deans and chapters by Hen. 8. The third class contains the *five cathedrals founded together, with new bishopries*, by Hen. 8. The fourth class are the new cathedrals of Ripon and Manchester.

(*b*) See 59 Geo. 3, c. 60; 3 & 4 Vict. c. 33; 15 & 16 Vict. c. 52, s. 2; 26 & 27 Vict. c. 121, as to the ordination of priests or deacons for or in the colonies.

(*c*) See Re Dean of York, 2 Q. B. 1.

(*d*) As to the *fees* payable on the visitation to the bishop's officials, see 30 & 31 Vict. c. 135, and Veley v. Pertwee, Law Rep., 5 Q. B. 573. It may be here noticed, that the bishop is also often, by virtue of his office, a *trustee* for charitable and other purposes within his diocese: and by 21 & 22 Vict. c. 71, in certain cases where the limits of the diocese have become altered, power is given to the charity commissioners to substitute in the place of such bishop, the bishop of another diocese, or to enable the one to act jointly with the other.

He is also an ecclesiastical judge (*e*); but his chancellor is appointed to hold his consistory courts for him, and to assist him in matters of ecclesiastical law (*f*). In case of complaint, however, against a clerk in holy orders, for any ecclesiastical offence (*g*) under the Church Discipline Act, (3 & 4 Vict. c. 86,) the bishop of the diocese wherein such offence has been committed (*h*) issues a commission for inquiry into the same (*i*); and, if it shall then appear to him that there is sufficient ground for proceeding farther, he is to hold a court to hear the cause, assisted by three assessors: one of whom must be either the dean of his cathedral, or one of his archdeacons, or his chancellor; and another must be either a serjeant at law or an advocate who has practised five years in the court of the archbishop of the province, or a barrister of seven years' standing. The bishop may, at such hearing, either determine the cause himself or send it to the court of appeal for the province: and in either case an appeal lies ultimately to the queen in council (*k*). It is moreover

(*e*) As to the local limits of the jurisdiction of the bishop, see the temporary Act of 10 & 11 Vict. c. 98; continued by 36 & 37 Vict. c. 75, to 1st August, 1874, and end of then next session.

(*f*) By the canons of 1603, the chancellor of a diocese must be either a bachelor of law or a master of arts. (See Godolph. Ab. 82.)

(*g*) As to what conduct amounts to such offence, see *Rugg v. Bishop of Winchester*, Law Rep., 2 Adm. & Ecc. Ca. 247; 2 P. C. Ca. 223; *Martin v. Mackonochie*, ib., 2 Adm. & Ecc. Ca. 116; 2 P. C. Ca. 365. As to proceedings under this Act, see also *Simpson v. Flamank*, Law Rep., 1 P. C. Ca. 463.

(*h*) Vide sup. p. 527, n. (*g*). In case the bishop is the patron of the preferment held by the clerk pro-

ceeded against, the *archbishop* acts. (See *Ex parte Denison*, 4 Ell. & Bl. 292; *The Queen v. The Archbishop of Canterbury*, 6 Ell. & Bl. 546.) As to the appeal in such case, see *The Queen v. The Judge of the Arches Court*, 7 Ell. & Bl. 313.

(*i*) The Act directs that there shall be five commissioners for this purpose, one of whom shall be the bishop's vicar-general, or an archdeacon or rural dean of the diocese (sect. 3). It seems that the bishop has a discretion whether or no he will issue a commission. (*The Queen v. The Bishop of Chichester*, 2 Ell. & Bl. 209.) But the acceptance of the *letters of request* lodging the complaint is not optional. (*Sheppard v. Phillimore & Bennett*, Law Rep., 2 P. C. Ca. 450.)

(*k*) If the bishop himself gives

the business of a bishop to institute, and to direct induction, to all livings in his diocese, to license to perpetual curacies (*l*), and also to license temporary curates within the diocese, as well as to regulate their salaries (*m*).

[Archbishoprics and bishoprics may become void by deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior. Hence a bishop may resign to his metropolitan; but the archbishop can resign to none but the sovereign himself (*n*).]

The claims of the crown on archbishoprics and bishoprics, in respect of the custody of the temporalities, and in respect of the first fruits and tenths of all spiritual preferments, have been already noticed, and need not, therefore, be again discussed in this place (*o*). We may mention however here, that, when any spiritual person is made an English bishop, the preferments of which he was before possessed become, in general, void upon his consecration (*p*); and the sovereign may present to them by his prerogative royal (*q*).

judgment, there is an appeal, in the first instance, to the court of appeal for the province. (3 & 4 Vict. c. 86, s. 15.)

(*l*) Vide post, p. 682.

(*m*) 1 & 2 Vict. c. 106, s. 77. See also 3 & 4 Vict. c. 33, authorizing the bishops to permit clergy of the Protestant episcopal church in Scotland, or of the United States, to officiate in their respective dioceses. See also 26 & 27 Vict. c. 121, in reference to clergymen of the Scottish episcopal church holding preferments in England.

(*n*) Gibs. Cod. 822. By 32 & 33 Vict. c. 111 (continued by 35 & 36 Vict. c. 40), provisions are made for securing to an archbishop or bishop, desirous to resign by reason

of being incapacitated by age or some mental or permanent physical infirmity for the due performance of his duties, a retiring income charged upon the revenues of the see or diocese. The Act also provides for the election by the dean and chapter of a *bishop coadjutor* in aid of a bishop who requires assistance.

(*o*) Vide sup. pp. 530, 531.

(*p*) This privilege of the crown does not apply in the case of a promotion to a *colonial* bishopric. (The Queen v. Eton College, 8 Ell. & Bl. 610.)

(*q*) 1 Bl. Com. 383. See Basset v. Gee, Cro. Eliz. 790; Att.-Gen. v. Bishop of London, 4 Mod. 210; Grocers' Company v. Archbishop of

II. [A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see (*r*). When the rest of the clergy were settled in the several parishes of each diocese (*s*), these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean (*t*).]

The bishop is the immediate superior and ordinary of the dean and chapter, and exercises over them the power of *visitation* (*u*).

The chapter, who, as distinct from the dean, consist of certain dignitaries called canons (*x*), are sometimes appointed by the crown, sometimes by the bishop, and sometimes by each other (*y*). At one period the dean was elected by the chapter, on a *congé d'élire* from the crown, in the same manner as bishops; but in those deaneries which were founded by Henry the eighth, out of the spoils of the dissolved monasteries, the title has always been donative, and the installation merely by

Canterbury, 2 W. Bl. 770. It is laid down also by Sir E. Coke, 2 Inst. 491, that, on the death of every prelate in England, the crown is entitled to six things, viz., the bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cap and cover; his bason and cover; his gold ring; and, lastly, his *muta canum*, his mew or kennel of hounds. (2 Bl. Com. 426.) The right to these things is considered by Blackstone as in the nature of a *mortuary*; but Lord Coke says it was a *fine* to the crown for empowering the bishops to grant probates, &c. (See *Mirchouse v. Rennell*, 8 Bing. 497.)

(*r*) *Dean and Chapter of Norwich's case*, 3 Rep. 75; Co. Litt. 103, 300.

(*s*) Vide sup. vol. I. p. 116.

(*t*) This, says Blackstone (vol. i. p. 382), was probably because the dean was at first appointed to superintend *ten* canons or prebendaries.

(*u*) See *Re Dean of York*, 2 Q. B. 1.

(*x*) By 3 & 4 Vict. c. 113, s. 1, all the members of Chapters, except the dean, in every cathedral and collegiate church in England, shall be styled canons. Such canons, however, as are *prebendaries*, differ from such as are not, as having a *prebend*, or fixed portion of the rents and profits of the cathedral or collegiate church for their maintenance.

(*y*) See 3 & 4 Vict. c. 113, ss. 24, 26; and 4 & 5 Vict. c. 39, as to the right of appointment to certain canonries.

letters-patent from the crown (*z*). And now this is the course with respect to the antient deaneries also; it being provided by 3 & 4 Vict. c. 113, that from the date of that Act every deanery (except in Wales) shall be in the direct patronage of Her Majesty: and that no person shall hereafter be capable of receiving the appointment either of dean, archdeacon, or canon, until he shall have been six years complete in priest's orders,—except, indeed, in the case of a canonry annexed to any professorship, headship, or other office in some university (*a*). It is further provided, that every dean shall reside for at least eight months in the year (*b*): that the term of a canon's residence shall be at least three months in the year (*c*): that the right of nominating a regulated number of *minor* canons, with salaries, shall in future be in all cases vested in the respective chapters (*d*): and that *honorary* canons, without salaries, shall be appointed for every cathedral church in which there are not already founded any non-residentiary prebends, dignities and offices (*e*); which honorary canonries shall be in the gift of the archbishops and bishops respectively (*f*).

Deaneries and canonries may become void by deprivation, or by resignation either to the king or the bishop (*g*).

III. [An *archdeacon* hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout

(*z*) See the note by Mr. Hargrave, Co. Litt. 95; and 1 Bl. Com. 383.

(*a*) 3 & 4 Vict. c. 113, s. 27.

(*b*) Sect. 3.

(*c*) Ibid.

(*d*) Sect. 45.

(*e*) Since the 3 & 4 Vict. c. 113, non-residentiary prebendaries have ceased to be members of the chapters. (Randolph v. Milman, Law

Rep., 2 C. P. 60.)

(*f*) Sect. 23.

(*g*) Grendon v. Bishop of Lincoln, Plowd. 498. See 35 & 36 Vict. c. 8, providing for the resignation of any dean or canon who by reason of age or infirmity is permanently incapacitated, and charging the deanery or canonry with a pension not exceeding one-third of its value.

[the whole of a diocese or in some particular part of it (*h*). He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his (*i*). He therefore *visits* the clergy (*k*); and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance (*l*).] As a general rule (but subject to exception in the case of particular archdeacons), the jurisdiction of the archdeacon and the bishop are *concurrent*, so that a suit may be commenced in the court of either (*m*). An archdeaconry may become void by deprivation or resignation.

IV. [The *rural deans* are very antient officers of the church (*n*), but their authority is almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry (*o*).] They seem originally to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report

(*h*) As to the ecclesiastical division of dioceses into archdeaconries, of archdeaconries into rural deaneries, and of rural deaneries into parishes, vide sup. vol. I. p. 116.

(*i*) 1 Burn's Eccl. Law, 68, 69.

(*k*) As to the *fees* payable to his officials on his visitation, see 30 & 31 Vict. c. 125; and *Veley v. Pertwee*, Law Rep., 5 Q. B. 573, by which case it appears that the churchwardens are not *personally* liable for their due payment.

(*l*) By 6 & 7 Will. 4, c. 77, s. 19, it is provided that all archdeacons throughout England and Wales shall have and exercise full and equal jurisdiction within their respective archdeaconries, any usage

to the contrary notwithstanding. And see 6 & 7 Will. 4, c. 77; 3 & 4 Vict. c. 113; and 4 & 5 Vict. c. 39, for provisions as to the endowment and arrangement of archdeaconries.

(*m*) Rogers's Eccl. Law, 60. See further as to the archdeacon's court, post, bk. v. c. v.

(*n*) Kennett, Par. Antiq. 633; Dansey, *Horæ Decanicæ Rurales*.

(*o*) See 6 & 7 Will. 4, c. 77, s. 1, and 3 & 4 Vict. c. 113, s. 32. In the Report on Public Religions Worship, by the Registrar-General, under the census of 1851, it is said there were then 463 rural deaneries in England and Wales (p. xxxvi).

dilapidations, and to examine the candidates for confirmation; and were armed, in minuter matters, with an inferior degree of judicial and coercive authority (*p*).

V. The next, and indeed the most numerous, order of men in the system of ecclesiastical polity are the *rectors* and *vicars* of churches: concerning whom we will now speak somewhat at large.

1. [The rector (or governor) of a church is also properly called “a parson,” *persona ecclesiæ*, that is one that hath full possession of all the rights of a parochial church (*q*). He is called *parson*, because by his person the church, which is an invisible body, is represented: and this appellation (however it may be depreciated by familiar, clownish and indiscriminate use) is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, (Sir Edward Coke observes,) and he only, is said *vicem seu personam ecclesiæ gerere*. And the freehold of the parsonage house, the glebe, the tithes, and other dues, all vest, during his life, in the parson. But here we must take occasion to explain the doctrine of appropriations, with which the distinction between rectors and *vicars* is closely connected.

This contrivance of appropriating livings seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a four-fold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. But when the sees of the bishops became otherwise amply endowed, they were

(*p*) Gibs. Cod. 972, 1550.

(*q*) The proper term for a parson in full possession of his living

is, in law, *persona impersonata*, or parson imparsonce. (See Co. Litt. 300.)

[prohibited from demanding their usual share of these tithes, and the division was thenceforth into three parts only. Hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burthen of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then *appropriated* the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and the consent of the bishop, had first to be obtained; because both the king and the bishop might some time or other have an interest, by lapse, in the presentation to the benefice (which can never happen if it be appropriated to the use of a corporation, which never dies); and also because the law reposed a confidence in them, that they would not consent to anything that should be to the prejudice of the church. The consent of the patron also was necessarily implied: because (as was before observed) the appropriation could be originally made to none, but to such spiritual corporation as was also the patron of the church; the whole being indeed nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church (*r*). When the appropriation was thus made, the appropriators and their successors became perpetual parsons of the church, so as to sue and be sued, in all matters concerning the rights of the church, by the name of parsons (*s*).]

Appropriators were thus in their origin always persons

(*r*) *Grendon v. Bishop of Lin-*
coln, Plowd. 496—500.

(*s*) *Wright v. Gerard*, Hob. 307.

spiritual,—such as bishops, prebendaries, monasteries, and other religious houses, nay, even nunneries, and certain military orders; all of which were spiritual corporations. But the case is now different; for by 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the monasteries and religious houses were dissolved, and the appropriations which belonged to them respectively, amounting to more than one-third of all the parishes in England, were thereby given to the king in as ample a manner as the appropriators held the same at the time of their dissolution (*t*); a proceeding which, though perhaps scarcely defensible, was not without example; for the same thing was done in former reigns with respect to the alien priories, that is, such as were filled by foreigners only (*u*); and many of the appropriations so vested in the crown by the effect of these several dissolutions, being afterwards from time to time granted out by the crown to subjects, are now in the hands of lay persons,—who are usually styled, by way of distinction, *lay impropriators*, though the term of *appropriators* is in strictness as applicable to these as to the original holders (*x*).

[Appropriations of either class are capable, it is held, of being severed, so that the church may become disappropriate; as if the appropriator presents a clerk, who is instituted and inducted to the rectory: for the incumbent so instituted and inducted is to all intents and purposes a complete parson; and the appropriation, being once severed, can never be reunited again, unless by a repetition of the same solemnities (*y*).]

In appropriations there is generally a spiritual person attached to the same church, under the name of *vicar*, to whom the spiritual duty, or *cure of souls* (as it is

(*t*) 1 Bl. Com. 386; Seld. Review of Tithes, c. 9; Spelm. Apology, 35.

(*u*) 2 Inst. 584.

(*x*) See Burn's Eccl. Law, vol. i. 66; Christian's Blackstone, vol. i. 388, (n.); Spelm. Tithes, c. 29.

(*y*) Co. Litt. 46. Blackstone (ubi sup.) mentions another method of disappropriating a living, namely, by the corporation which has the appropriation becoming dissolved.

termed), belongs: and to whom, on the other hand, a certain portion of the tithes or other emoluments of the church, is assigned by way of exception out of those enjoyed by the appropriator. The origin of these vicars is as follows (z):

[The appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar* (a). His stipend was at the discretion of the appropriator; who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus debeat respondere* (b). But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose; and, accordingly, it was enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches the diocesan bishop shall ordain, (in proportion to the value of the church,) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which among other purposes the payment of tithes was originally imposed: and therefore in this Act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too

(z) As to vicarages, see 40 Edw. 3, pl. 27; *Britton v. Wade*, Cro. Jac. 516; *Spelm. Tithes*, 153; *Bird v. Relph*, 2 Ad. & El. 780; *Rogers's Eccl. L.* 890.

(a) See *Grendon v. Bishop of Lincoln*, Plowd. 493; *Seld. c.* 11,

s. 1. It would seem that such ministers existed as long ago as the reign of Henry the second, but they are said to have been then few in number. (*Bird v. Relph*, ubi sup.)

(b) *Seld. Tith. c.* 11, 1.

[rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV. c. 12, it was ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed at the discretion of the ordinary, for these three express purposes,—to do divine service, to inform the people, and to keep hospitality (*c*). The endowments in consequence of these statutes have usually been by a portion of the glebe or lands belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect: the greater part being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.]

Such is the history of the distinction between rectors and vicars, the law on which subject may be summarily stated thus. Of parochial churches some have been appropriated, others have not: in a non-appropriated living there is no vicar, but a rector only, who must be a spiritual person, and has the cure of souls in the parish, with the exclusive title to all the emoluments (*d*):

(*c*) From this Act (4 Hen. 4, c. 12) may be dated the origin of the *present* vicarages; for before this time the vicar was nothing more than a temporary curate, and when the church was appropriated to a monastery, he was generally one of their own body, that is, one of the *regular* clergy; for the monks, who lived *secundum regulas* of their respective houses or societies, were denominated *regular* clergy, in contradistinction to the parochial clergy,

who performed their ministry in the world, *in seculo*, and who from thence were called *secular* clergy. (Christian's Blackstone, vol. i. p. 387, n.)

(*d*) By 2 & 3 Vict. c. 30, reciting that there are several benefices, in which more than one spiritual person has the general cure of souls, the bishop is empowered, where such is the case, to order an apportionment of the spiritual services.

in an appropriated living, there is generally, besides the appropriator, a vicar: and in churches so circumstanced (termed *vicarages*), the appropriator never (as appropriator) has the cure of souls within the parish; which is committed to the vicar. And as to the emoluments in vicarages, they belong in part to the appropriator, in part to the vicar, according to distinctions already in part referred to, but to be discussed more fully hereafter. To these explanations it may be proper to add, that, in non-appropriated churches, the rector,—in those which are appropriated, the vicar,—is seised for his life only, the fee being in abeyance (*e*); but the appropriator may be seised in fee, (subject to the incumbent's life interest,) or of a less estate, according to the circumstances of his title (*f*).

But it is not in all appropriations that a vicar exists; for in some it happens, in consequence of their being exempted (for particular reasons) from the statute of 4 Hen. IV. c. 12, that no vicar has ever been endowed (*g*). Such churches, however, usually possess a permanent minister in holy orders, of the same general description,—who, under the denomination of *perpetual curate*, is charged with the cure of souls, and entitled to emolument for his services (*h*). But the law of perpetual curacies must now be taken in connection with a recent statute (31 & 32 Vict. c. 117), which enacts that the incumbent of the church of every parish or new parish for ecclesiastical purposes, not being a *rector*, who is en-

(*e*) Vide sup. vol. i. p. 227, n.

(*f*) As to the subject of appropriation, see *Grendon v. Bishop of Lincoln*, Plowd. 493; *Duke of Portland v. Bingham*, 1 Hagg. Consist. Rep. 162.

(*g*) 1 Bl. Com. 394; 1 Burn's Eccl. L. 427; Wats. C. L. 172. As to 4 Hen. 4, c. 12, vide sup. p. 681.

(*h*) It may be noticed that “a

perpetual curate” is liable to his successor for dilapidations. (*Mason v. Lambert*, 12 Q. B. 795.) And for other points with regard to him, see *Doe v. Thomas*, 9 A. & E. 556; *Hine v. Reynolds*, 2 Man. & Gr. 71; *Doe d. Brammall v. Collinge*, 7 C. B. 939; see also 1 Geo. 1, c. 10, ss. 4 and 21.

titled to perform marriages, churchings, and baptisms, and to claim the fees thereof for his own use, shall for the purpose of style and designation, but not for any other purpose, be deemed and styled the *vicar*, and his benefice a *vicarage*.

It is to be observed also, as another anomaly in the law of vicarages, that in former times the rector of a benefice, having cure of souls, sometimes obtained permission from superior authority to appoint a vicar to officiate under him; so that, by this means, two persons were instituted to the same church, and both had cure of souls; the effect of which was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties. An incumbent so circumstanced is commonly called a *sinecure rector*, or rector without cure of souls (*i*). But by 3 & 4 Vict. c. 113, it is now provided that all ecclesiastical rectories without cure of souls (having a vicar endowed or a perpetual curate), which are in the sole patronage of the crown or of any ecclesiastical corporation aggregate or sole, shall, immediately upon future vacancies, be entirely suppressed; and that the patronage of all others may be at any time sold to the Ecclesiastical Commissioners, and shall thereupon be also suppressed (*h*); and that the lands, tithes, and endowments of any such suppressed sinecure rectory may be annexed, when it shall appear expedient, to the vicarage or perpetual curacy attached to such rectory: which shall be thereupon constituted a rectory with cure of souls (*l*).

We have thus had occasion to speak of three several kinds of parochial preferments, viz., rectories, vicarages, and perpetual curacies (*m*). And as to each of these we

(*i*) See 2 Burn's Eccl. L. 347; Christian's Blackstone, vol. i. p. 386, (n.); Rogers's Eccl. L. 890; Gibs. Cod. 753.

(*h*) 3 & 4 Vict. c. 113, s. 48.

(*l*) Sect. 55.

(*m*) But vide sup. p. 682, as to the effect of 31 & 32 Vict. c. 117, on perpetual curacies.

may remark, that they are usually comprehended under the general term of *benefice* (*o*); a term indeed which, in its technical sense, (though not in its popular acceptation,) extends not only to these, but also to any ecclesiastical preferment to which rank or public office is attached, and which are described in our books as ecclesiastical *dignities* or *offices*, such as bishoprics, deaneries, and the like (*p*).

2. The method of becoming a parson (or rector) and becoming a vicar is much the same. To both there are in general four requisites necessary: *holy orders*; *presentation*; *institution*; and *induction*. The method of conferring *holy orders* has been already so far noticed as the purpose of these Commentaries required. We have seen that the age of twenty-three years is now the earliest at which a man may (except by faculty or dispensation of the Archbishop of Canterbury) be ordained deacon; and that twenty-four is the earliest age at which he may be ordained priest (*q*): and, in reference to this qualification of holy orders, we shall here only add, that, (by 13 & 14 Car. II. c. 4, s. 14,) no person is capable of being admitted to any benefice unless he shall have been first ordained priest.

[Any person may be *presented* to a rectory or vicarage (*r*); that is, the patron, to whom the advowson

(*o*) As to the primary meaning of the word *benefice* (a term derived from the feudal law), vide sup. vol. I. p. 173.

(*p*) 3 Inst. 174. By 1 & 2 Vict. c. 106, s. 124, a distinction is made between *benefices* and such preferments as have either rank or public office connected with them,—that statute having adopted the two general terms of *benefices* and *cathedral preferments*; by the former of which it is to be understood to mean all parochial or district

churches, and endowed chapels and chapelries; by the latter, all deaneries, archdeaconries, and canonries, and (generally) all dignities and offices in any cathedral or collegiate church below the rank of a bishopric. See also as to the term *benefice*, 5 & 6 Vict. c. 27, s. 15; c. 108, s. 31; and 13 & 14 Vict. c. 98, s. 3.

(*q*) Vide sup. p. 660.

(*r*) If a layman or a deacon be presented, he must take priest's orders before admission. (1 Burn's E. L. 103.)

[of the church belongs, may offer his nominee to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find it more convenient to treat when discussing the endowments and provisions of the church (*s*); and shall for the present only remark, that when a clerk is presented, the bishop may refuse him upon many accounts. 1. If the patron is excommunicated, and remains in contempt forty days (*t*). 2. If the clerk be unfit; which unfitness is of several kinds (*u*). First, with regard to his person; as if he be a bastard, an outlaw, an excommunicate, under age, or the like (*x*). Next with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*: but if the bishop alleges only in general, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like, it is not good cause of refusal (*y*). Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal (*z*); at least if the patron be a layman, for in that case he is presumably unaware of the disability. But if the objection be a temporal one, the bishop is not bound to give such notice (*a*).

(*s*) Vide post, ch. III.

(*t*) 2 Roll. Abr. 355.

(*u*) Glanv. l. 13, c. 20.

(*x*) Though illegitimacy be classed in the books among the causes of refusal, yet such is the liberality of the present times, that no one need apprehend that his presentation would be impeded by the incontinence of his parents, or by any demerit but his own. Christian's Blackstone, vol. i.

p. 389 (n.).

(*y*) Specot's case, 5 Rep. 58.

(*z*) See Bedingfield v. Archbishop of Canterbury, Dyer, 292 (*b*); Hele v. Bishop of Exeter, 2 Salk. 539; Albany v. Bishop of St. Asaph, Cro. Eliz. 119.

(*a*) 2 Inst. 632; 2 Burn, Eccl. L. 157; Hele v. Bishop of Exeter, ubi sup.

[If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be *instituted* by him; which is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk. But when the bishop is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a *collation* to the benefice.] And before institution or collation (as the case may be), the clerk must renew the "declaration of assent" he made previously to his ordination, and must also make and subscribe the declaration against simony, and take the oath of allegiance to the Queen (as framed by 31 & 32 Viet. c. 72,) before the archbishop or bishop or their commissary; and he must also take the oath of canonical obedience to the bishop (*b*). [By institution or collation, the church is full, so that there can be no fresh presentation till another vacancy,—at least in the case of a common patron: but the church is not full against the crown, till induction: nay, even if a clerk has been instituted upon the crown's presentation, the crown may revoke it before induction, and present another clerk (*c*). Upon institution the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice and sufficient certainty of their new minister, to whom their tithes are to be paid. This,

(*b*) 28 & 29 Viet. c. 122, s. 5, and (*c*) Co. Litt. 344.
see sect. 12.

[therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a living, he is then, and not before, in full and complete possession (*d*).] The title, however, of any person instituted, collated or licensed to any benefice with cure of souls will be afterwards devested, unless on the first Lord's day on which he officiates in the church of the benefice, or such other Lord's day as the ordinary shall appoint and allow, he shall publicly read therein, in the presence of the congregation, the Thirty-nine Articles of religion, and immediately afterwards repeat the "declaration of assent" prescribed by 28 & 29 Vict. c. 122, which he made previously to his ordination (*e*).

In addition to the methods of acquisition which have been mentioned, there are benefices which a clerk may obtain by mere donation, that is, by deed of gift alone, without presentation, institution, or induction. [With respect to *donatives* it is to be observed, that they are created whenever the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, shall be subject to his visitation only, and not to that of the ordinary, and shall become vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (*f*). This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of Archbishop à Becket, in the reign of Henry the second (*g*). And therefore though Pope Alexander the third (*h*), in a letter to à Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shows what was then the common usage. Others

(*d*) Co. Litt. 300.

(*e*) Vide sup. p. 661; 28 & 29
Viet. c. 122, s. 7.

(*f*) Co. Litt. 344; 2 Bl. Com. 23.

(*g*) Seld. Tith. c. 12, s. 2.

(*h*) Decretal. l. 3, t. 7, c. 3.

[contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island: and in proof of it they allege a letter from the English nobility to the Pope in the reign of Henry the third, recorded by Matthew Paris, which speaks of presentation to the bishop as a thing immemorial (*i*). The truth seems to be, that where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; and that this practice prevailed till about the middle of the twelfth century, when the Pope and his bishops endeavoured to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if the patron of a donative *once* waives his privilege, and presents to the bishop and his clerk is thereon admitted and instituted, the advowson becomes for ever presentative, and shall never be donative any more (*k*). For these exceptions to general rules and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever: and will therefore reduce it to the standard of other ecclesiastical livings (*l*).

3. The rights of the clergy in their tithes and eccle-

(*i*) A.D. 1239.

(*k*) Co. Litt. 344; Farchild *v.* Gayre, Cro. Jac. 63.

(*l*) As to donative benefices, see Co. Litt. ubi sup.; Wats. C. L. 170;

2 Bl. Com. 23, note by Christian; Reppington *v.* Governor of Tamworth School, 2 Wils. 150; Rennell *v.* Bishop of Lincoln, 8 Bing. 490; Queen *v.* Foley, 2 C. B. 664.

[siastical dues fall more properly under our third division, as to the endowments and provisions of the Church: and as to their duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon them by statute. And these are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark upon as they arise in the progress of our inquiries; but for the rest it will be sufficient to refer to such authors as have compiled treatises expressly upon this subject(*m*). We shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an *incumbent*.]

The present enactments on this subject will be chiefly found in 1 & 2 Vict. c. 106(*n*), and 13 & 14 Vict. c. 98, which provide that every spiritual person holding a benefice, shall reside thereon, and in the house of residence (if any) belonging thereto; and that if he absents himself for a period exceeding three months, (either accounted together or at several times,) in any one year, he shall forfeit, unless resident at some other benefice to him belonging, a certain portion, (increasing with the length of absence,) of the annual value of the benefice at which he so fails to reside(*o*). But this rule is subject to various exceptions and modifications, of which the principal are as follows: 1st. The heads of all colleges and halls in the universities of Oxford or Cambridge, the warden of the university of Durham, and the head master

(*m*) Among the treatises on the law of the Church which may be relied upon with confidence, are Bishop Gibson's Codex, Dr. Burn's Ecclesiastical Law, and the earlier editions of the Clergyman's Law, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister. (1 Bl. Com. p. 392.)

(*n*) See 32 & 33 Vict. c. 109.

(*o*) 1 & 2 Vict. c. 106, s. 32. The term *benefice*, for the purpose of this Act, comprises all parochial churches, perpetual curacies, chapels, and church or chapel districts whatever, with cure of souls (sect. 124).

of Eton, Winchester or Westminster school, are exempt from the penalties of non-residence (*p*). 2ndly. Deans and archdeacons,—and a variety of public professors, readers, preachers and chaplains specified in the Act,—as likewise the provost of Eton, the warden of Winchester, the master of the Charterhouse, the principal of St. David's and of King's College, London, and also (provided they are not absent from their benefices more than *five* months in the year) the fellows of Eton and Winchester—and all canons, minor canons, priest vicars, and vicars choral—are severally entitled to count the time passed at their official residences or in the performance of their duties, as if it had been passed upon their benefices (*q*). 3rdly. If there be no fit residence belonging to the benefice, the bishop may from time to time license the incumbent to reside in some other house within a certain specified distance from his church or chapel; and such house shall thereupon become a legal house of residence for all purposes. 4thly. If there be no fit house of residence, and no convenient house can be obtained within the specified distance, or if the incumbent cannot reside on his benefice by reason of any incapacity of mind or body, or owing to the dangerous illness of his wife or child, (but subject in the latter case to certain restrictions as to time and otherwise,) application may be made to the bishop for a licence of non-residence; and in case of his refusal, there is an appeal to the archbishop of the province (*r*). 5thly. If the incumbent shall occupy, in the same parish, any mansion whereof he is the owner, a similar application for a licence to reside therein may be made, with the same power of appeal in case of refusal (*s*). 6thly. The bishop is empowered, in any other case besides those enumerated, to grant a licence to reside out of the limits of the benefice;—but in a case of this description the special circumstances and reasons

(*p*) 1 & 2 Vict. c. 106, s. 37.(*q*) Sects. 31, 39.(*r*) Sect. 43.(*s*) Ibid.

must be transmitted to the archbishop, without whose allowance such licence will be ineffectual (*t*).

It is farther provided that annual returns of residents and non-residents shall be made to her majesty in council (*u*); and that, in case of non-residence, the bishop, instead of proceeding to enforce the penalties above mentioned, may, if he thinks fit, issue a monition against the offender, to be followed up by an order to reside; and in case of non-compliance with such order, may sequester the profits of the benefice, and apply them to the purposes in the Act specified (*x*). And in case of long continued or repeated sequestration, the benefice is to become void, and a new presentation may be made, as if the former holder were dead (*y*).

For the more effectual promotion of this important duty of residence, among the parochial clergy, there are also contained in the statute book a variety of provisions for repairing the houses of residence, and building or purchasing new ones; and for raising money, for these purposes, by mortgage of the benefices (*z*).

4. There are many ways by which a clerk may lose his preferment; and 1st. By *cession*, or taking another benefice (*a*). For by the statute 1 & 2 Viet. c. 106, before mentioned (in substitution of the previous provisions of the 21 Hen. VIII. c. 13, as to pluralities, which the Act repeals), and also by 13 & 14 Viet. c. 98, it is enacted, that in future (and subject to exception in the

(*t*) 1 & 2 Viet. c. 106, s. 44.

(*u*) Sects. 51, 53.

(*x*) Sect. 54. As to the proceedings to sequestration for non-residence, see *Ex parte Bartlett*, 12 Q. B. 488; *Daniel v. Morton*, 20 L. J. (Q. B.) 98; *Bartlett v. Kirwood*, 2 Ell. & Bl. 771.

(*y*) Sect. 58.

(*z*) For such provisions, see 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 43

Geo. 3, cc. 107, 108; 51 Geo. 3, c. 115; 55 Geo. 3, c. 147; 5 Geo. 4, c. 89; 6 Geo. 4, c. 8; 7 Geo. 4, c. 66; 1 & 2 Viet. cc. 23, 29, 106, ss. 25, 62, &c.; 3 & 4 Viet. c. 113, s. 59; 4 & 5 Viet. c. 39, s. 18; 5 & 6 Viet. c. 26 (repealing 2 & 3 Viet. c. 18); 19 & 20 Viet. c. 104, s. 27; 28 & 29 Viet. c. 69.

(*a*) 1 Bl. Com. 392.

case of rights already vested), no person shall hold together any two benefices,—except in the case of two whereof the churches are within three miles of one another, by the nearest road, and the annual value of one of which does not exceed 100*l.* (*b*): that no person holding a benefice with cure of souls with a population of more than 3,000, shall hold therewith any other having a population of more than 500; that no person holding two benefices with cure of souls, shall hold therewith a third, or any cathedral preferment (*c*): and that, upon every admission to a new benefice or preferment contrary to the Acts, every benefice previously held shall be void *ipso facto* (*d*):—all of which prohibitions, however, in respect of population and yearly value, are subject to a provision whereby the Archbishop of Canterbury is enabled, in certain cases, to grant a dispensation therefrom on recommendation of the bishop of the diocese (*e*). 2ndly. [By *consecration*; for, as was mentioned before, when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated (*f*). But a method was formerly in use, by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This might be temporary—for one, two, or three years, or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*: and used to be granted to bishops in the poorer sees, to aid the deficiency of their episcopal revenue. And there

(*b*) See, however, the provisions of 1 & 2 Vict. c. 106; 13 & 14 Vict. c. 98; 23 & 24 Vict. c. 142, and 34 & 35 Vict. c. 90, as to effecting the union of contiguous benefices.

(*c*) 1 & 2 Vict. c. 106, s. 2.

(*d*) Sect. 11; 13 & 14 Vict. c. 98, s. 7.

(*e*) 1 & 2 Vict. c. 106, ss. 5, 6.

See also provisions against various cases of plurality, as regards *persons holding cathedral preferments*, 1 & 2 Vict. c. 106, s. 11; 4 & 5 Vict. c. 39; 13 & 14 Vict. c. 98, s. 11; *deans of cathedrals*, 13 & 14 Vict. c. 94, s. 19; and *heads of colleges*, 13 & 14 Vict. c. 98, ss. 5, 6.

(*f*) Vide sup. p. 673.

[was also a *commenda recipere*, which is, to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this was the same to him as institution and induction are to another clerk (*g*).] But now, by 6 & 7 Will. IV. c. 77, s. 18, no ecclesiastical dignity, office or benefice shall be held in *commendam* by any bishop, unless he held the same when that Act passed; and every *commendam* thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void to all purposes (*h*). [3rdly. By *deprivation*; which is either upon sentence declaratory in the ecclesiastical or other proper court (*i*), or else on such nonfeasance or neglect, malfeasance or crime, as some penal statutes declare shall avoid the benefice; in which cases, the benefice is *ipso facto* void without any formal sentence of deprivation (*h*). Deprivation may take place on any fit and sufficient cause (*l*), among which the following may be instanced:—conviction of treason, felony, or other infamous crime (*m*); or of heresy (*n*), infidelity (*o*), gross immorality, and the like; a third conviction of having engaged in trade (*p*); simony (*q*) or plurality (*r*); maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer (*s*)]; neglecting to read in church the thirty-nine articles, and to make the proper “declaration of assent” at the time appointed by the ordinary (*t*); using any other form of prayer than the

(*g*) *Colt v. Bishop of Lichfield and Coventry*, Hob. 144.

(*h*) See also as to the Bishop of Sodor and Man, 1 & 2 Vict. c. 30.

(*i*) See the Church Discipline Act (3 & 4 Vict. c. 86); and *Re Dean of York*, 2 Q. B. 1; *Ex parte Denison*, 4 Ell. & Bl. 292.

(*k*) 1 Bl. Com. p. 393.

(*l*) See *Green's case*, 6 Rep. 29, 30.

(*m*) *Bishop of Chichester v. Webb*,

Dyer, 108; *Jenk.* 210.

(*n*) See *Ex parte Denison*, *ubi sup.*

(*o*) *Fitz. Abr. tit. Trial*, 54.

(*p*) 1 & 2 Vict. c. 106, s. 31.

(*q*) *Stat. 31 Eliz. c. 6*; 13 Ann. c. 11.

(*r*) *Vide sup.* p. 691.

(*s*) 1 Eliz. cc. 1, 2; 13 Eliz. c. 12.

(*t*) 28 & 29 Vict. c. 122; *vide sup.* p. 687.

liturgy of the Church of England (*u*); and continued neglect, after order from the bishop followed by sequestration, to reside on the benefice (*x*). 4thly. By *resignation*; but this is of no avail, till accepted by the ordinary, into whose hands its resignation must be made (*y*); and in reference to this last mode notice may here be taken of the Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 91), which was passed with the object of relieving persons admitted to the office of priest or deacon in the Church of England from certain disadvantages to which they were previously exposed by acting as though they had not been so admitted.

In order to effect this object the Act in question provides that any person so admitted may, after having resigned any and every preferment by him held, execute and cause to be inrolled in Chancery a deed of *relinquishment* in a prescribed form and deliver an office copy of the same to the bishop of his diocese, to be recorded in the diocesan registry; and at the expiration of six months from the time of such delivery he shall be incapable of acting in any way as a minister of the Church of England, and cease to enjoy any right or privilege attaching to such office; and shall on the other hand be freed from all disabilities, disqualifications, restraints and prohibitions to which he would, under certain statutes, have been subject as a person who had been admitted to such office (*z*), and freed from all penalties and proceedings to which he

(*u*) 1 Eliz. c. 2.

(*x*) 1 & 2 Vict. c. 106, s. 58. As to the order of the bishop to reside, and the sequestration thereon, vide *sup.* p. 691.

(*y*) Fane's case, Cro. Jac. 198. By 34 & 35 Vict. c. 44 (called the Incumbents' Resignation Act, 1871), provision is also made to enable clergymen permanently incapacitated by illness to resign their benefices on the terms of receiving a pension to the amount of not more than one-third of the annual value; such pension to be charged on the revenues of the benefice, and to be recoverable as a debt from the incumbent thereof for the time being.

(*z*) These are 41 Geo. 3, c. 63; 5 & 6 Will. 4, c. 76, s. 28; 3 & 4 Vict. c. 86.

might under any law have been amenable, in consequence of any act or thing by him done under such admission (*a*).

VI. The lowest degree in the church is that of a *curate*: who is a clerk in holy orders employed (as the general rule) by the rector, vicar, or other incumbent of a living, either to serve in his absence, or as his assistant, as the case may be (*b*). Every stipendiary curate, before he enters on his duties, must, however, be *licensed* by the archbishop or bishop (*c*); and before such licence is granted he must make such declaration as is prescribed by the 28 & 29 Vict. c. 122, as to the *bonâ fide* character of the engagement, signed both by himself and the incumbent (*d*). He must also (unless having been ordained on the same day he has already done so) then make and subscribe the “declaration of assent” in that Act prescribed (*e*); and on the first Lord’s day on which he officiates, publicly and openly repeat such last-mentioned declaration in the presence of the congregation, and at the time of divine service (*f*). For the proper sustentation and payment of licensed curates, the law has made a variety of provisions. Thus, by 28 Hen. VIII. c. 11, such curates as serve a church during its vacancy shall be paid such stipend as the ordinary thinks reasonable out of the profits accruing during the vacancy; or, if that be not sufficient, it shall be made up by the successor, within fourteen days after he takes possession (*g*). And again, by 1 & 2 Vict. c. 106, numerous provisions are made

(*a*) 33 & 34 Vict. c. 92, s. 4.

(*b*) Burn’s Ecc. Law, by Tyrw., vol. ii. p. 54 (*a*). As to the common law right of the rector to appoint his curate, see *Arnold v. Bishop of Bath*, 5 Bing. 316. As to *lecturers* and *preachers*, see 7 & 8 Vict. c. 59; 18 & 19 Vict. c. 127, s. 12. As to a *perpetual* curate, vide sup. p. 682.

(*c*) Burn’s Ecc. Law, by Tyrw.

vol. i. p. 61; *Watson, C. L.* 147, 207, 335. Such licence, on due cause, is liable to be *revoked*. See *The Queen v. Archbishop of Canterbury*, 1 E. & E. 545.

(*d*) 28 & 29 Vict. c. 122, s. 6.

(*e*) Vide sup. p. 661.

(*f*) 28 & 29 Vict. c. 122, s. 8.

(*g*) 1 Bl. Com. 10.

as to the appointment and payment of curates, among which are the following:—that, in certain cases of non-residence by the incumbent, the bishop may, in his default, appoint a proper resident curate with a stipend (*h*); that where the bishop sees reason to believe that the duties of any benefice are inadequately performed, or where it is of a certain value or extent, he may (though in the first case only after referring the matter to certain commissioners appointed by him for that purpose) require the incumbent, whether actually resident or not, to nominate a proper curate with sufficient stipend, and on his default may himself make such appointment (*i*);—that the stipend of every curate appointed by the bishop shall be adjusted in proportion to the value and population of the benefice; that the stipend of a curate shall not in any case fall short of 80*l.* per annum, or of the annual value of the benefice, if it be under that amount (*k*); and that in all cases of dispute between the incumbent and the curate as to his stipend, the bishop may summarily decide without appeal, and enforce his sentence by monition and sequestration (*l*).

Thus much of the clergy, properly so called. There are, however, certain inferior officers connected with the church of whom the secular law takes notice; and that, principally, to assist the ecclesiastical jurisdiction where it is deficient in powers. On these officers we shall now make a few cursory remarks.

VII. *Churchwardens* (*m*) are the guardians or keepers of the church, and representatives of the body of the parish; but though in some sort ecclesiastical officers,

(*h*) 1 & 2 Vict. c. 106, ss. 76, 85.

(*i*) Sects. 77, 78.

(*k*) Sect. 85.

(*l*) Sect. 83. See *Daniel v. Mor-*
ton, 16 Q. B. 198.

(*m*) As to the legal position of

churchwardens, see Bac. Abr. and Burn's Ecc. Law, *in tit.* "Churchwardens," and the following cases; *Ex parte Winfield*, 3 Ad. & El. 614; *R. v. Marsh*, 5 Ad. & El. 468; *Bray v. Somer*, 2 B. & Smith, 374.

they are always lay persons (*n*). They are sometimes appointed by the minister, sometimes by the parish, in vestry assembled (*o*), and sometimes by both together, as the custom of the place directs (*p*). But where there is no custom, it is said the election must be according to the canons (*q*): and these direct that they shall be chosen by the joint consent of the minister and parishioners, if it may be; but if they cannot agree, then the minister is to choose one, and the parishioners another (*r*). They are to be chosen yearly in Easter week, and are generally two in number; are obliged, when chosen, to serve (*s*); and are sworn to execute their office faithfully (*t*). [They are taken, in favour of the church, to be for some purposes a kind of corporation, at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish (*u*): and one of their chief duties,

(*q*)
Reg. v. All
82. 69.

(*n*) Per Hale, Hard. 379; 1 Rol. Ab. 653; 2 Rol. Rep. 107.

(*o*) As to vestries, vide sup. vol. I. p. 120.

(*p*) As to the manner of the election, see Campbell v. Maund, 5 Ad. & El. 865; R. v. Rector of Lambeth, 8 Ad. & El. 356; Bremner v. Hull, Law Rep., 1 C. P. 748. The manner of electing them, for churches built under the *Church Building Acts*, is fixed by 58 Geo. 3, c. 45, s. 73; 1 & 2 Will. 4, c. 38, ss. 16, 25, and 8 & 9 Vict. c. 70, ss. 7, 8. With respect to churchwardens under the *New Parishes Acts*, see 6 & 7 Vict. c. 37, s. 17; 19 & 20 Vict. c. 104, s. 28.

(*q*) Catten v. Barwick, Str. 145. See Bac. Abr. Churchwardens, A. and the authorities there cited in the margin.

(*r*) Canon 89.

(*s*) Several classes of persons,

however, are either ineligible, or are exempted from the office, viz., peers of the realm; members of parliament; clergymen of the church of England; Roman Catholic Clergy; dissenting ministers; barristers; attorneys; clerks in court; physicians, surgeons and apothecaries (if duly registered under the 21 & 22 Vict. c. 90); aldermen and dissenting teachers; and all persons living out of the parish, unless they occupy a house of trade there. (See Steer's Parish Law, p. 84.)

(*t*) Canon 88. As to granting a mandamus to swear them in, see Ex parte Wingfield, 3 Ad. & El. 614, 615.

(*u*) See 9 Geo. 1, c. 7, s. 4; and as to their duties in regard to *parish lands*, see 59 Geo. 3, c. 12, ss. 8, 17; 5 & 6 Will. 4, c. 69, s. 4; Smith v. Adkins, 8 Mee. & W. 362.

[accordingly, is the care and management of the goods belonging to the church, such as the organ, bells, bible and parish books (*x*). But as to the church and churchyard they have no sort of interest in the property thereof (*y*); and if any damage be done thereto, the rector only, or vicar, shall have the action (*z*).] It is also part of their office, unless other persons are appointed by the ordinary for that purpose, to have the care of the benefice, during its vacancy; or while it is under sequestration for the debts of the incumbent (*a*). They are moreover required to see to the reparation of the church, and the making of the *church rates*, by which the expenses of it are to be defrayed. These rates are charged on all lands and houses in the parish; are assessed on the occupiers; and are made by the parishioners at large,—that is, by the *majority* of the parishioners present at a vestry to be summoned for that purpose by the churchwardens (*b*). But they are not now (as was formerly the case) as the general rule *compulsory* on the persons rated, and the only consequence of refusing to pay them is a disqualification from interfering with the monies arising from the rate. This important change in the law was effected by the 31 & 32 Vict. c. 109—which recites as the reason, that “church rates have for some years ceased to be made or collected in many parishes by reason of the opposition thereto, and in many other parishes where church rates have been made, the levying thereof has given rise to litigation and ill-feeling” (*c*). Churchwardens are also to

(*x*) Bac. Abr. Churchwardens, B.; Wats. C. L. 390; Addison v. Round, 4 Ad. & Ell. 799; Jackson v. Adams, 2 Bing. N. C. 402.

(*y*) As to the consecration and enlargement of churchyards, see 30 & 31 Vict. c. 133; and 31 & 32 Vict. c. 47.

(*z*) 1 Bl. Com. 395. Churchwardens cannot set up monuments;

Beckwith v. Harding, 1 B. & Ald. 508.

(*a*) Steer, P. L. 91.

(*b*) See the Braintree case (Burdur v. Veley, 12 Ad. & Ell. 247; Gosling v. Veley, 7 Q. B. 409; 12 Q. B. 328; 4 House of Lords' Cases, 679).

(*c*) The Act, however, excepts from its operation rates called church

make such order relative to seats in the church and chancel, not appropriated to particular persons, as the ordinary—who has in general the sole power in this matter(*d*)—shall direct; and, in practice, the arrangements are usually made by the churchwardens, even without any special direction from the ordinary(*e*). It is incident also to their office to enforce proper and orderly behaviour during divine service(*f*); and, to this end, it has been held that churchwardens may justify the pulling off a man's hat irreverently worn there, or the removal of the offender from the church(*g*). And besides these, there are a multitude of other parochial powers committed to their charge which cannot be particularized without descending to inconvenient minuteness(*h*). Formerly, indeed, they were joined with the overseers in the care and maintenance of the poor; but this duty is now in general taken from them by the effect of 4 & 5 Will. IV. c. 76, (the Act for amendment of the poor law,) and of the regulations introduced, under its authority, by the Local Government Board(*i*).

Such, then, in general, are the duties of churchwardens(*k*); to which we shall only add, that, in case of

rates, but partly applicable to other than ecclesiastical purposes; and, also, some other special cases, which accordingly are governed by the previous law on this subject. (31 & 32 Vict. c. 109, s. 2.)

(*d*) 3 Inst. 202; *Clifford v. Wicks*, 1 B. & Ald. 506; *contrà* as to the chancel, *Wats. C. L.* 288.

(*e*) *Rogers's Ecc. L.* 179.

(*f*) See *Burton v. Henson*, 10 Mee. & W. 105; *Worth v. Torrington*, 13 Mee. & W. 781.

(*g*) *Hawk. P. C. b. 1*, c. 63, s. 29; *Hawe v. Planner*, 1 Saund. 10; *S. C.* 1 Sid. 301.

(*h*) Among these may be noticed the duty formerly imposed upon

them by a provision of 1 Eliz. c. 2, of levying a forfeiture of one shilling on all such as do not resort to their parish church on Sundays and holidays. But this, with other provisions against non-conformity, was repealed by 9 & 10 Vict. c. 59.

(*i*) As to this Board, vide post, bk. IV. pt. III. c. II.

(*k*) In any parish the population of which exceeds 2,000 persons, and which is brought under the provisions of 13 & 14 Vict. c. 57, a *vestry clerk* may be appointed, who is to assist and advise the churchwardens and overseers in the duties of their office.

their wasting the goods of the church, or being guilty of other misbehaviour, they are liable to removal(*l*); and that, at the end of their year, they are bound to render an account of all their receipts and disbursements(*m*).

VIII. *Parish clerks* and *sextons* are also persons connected with the church, and by the common law have freeholds in their office(*n*); though the former may, by 7 & 8 Vict. c. 59, s. 5, be suspended or removed by the archdeacon or other ordinary for misconduct or neglect. The duties of the parish clerk are too familiarly known to require description. In some few instances he is in holy orders(*o*); but his general qualification is only that he should be at least twenty years of age; known to the rector, vicar, or other minister, to be of honest conversation, and sufficient for his office(*p*). He is generally appointed by the incumbent(*q*); but by custom may be chosen by the inhabitants(*r*): his appointment

(*l*) Steer, P. L. 95.

(*m*) Steer, P. L. 92; *Leman v. Goulty*, 3 T. R. 3; *Astle v. Thomas*, 2 B. & C. 271. It is said that in London, the case of churchwardens is in some respects peculiar; that they are generally chosen there by the parishioners independently of the parson; are a corporation for all purposes; have the disposal of the seats in the church, independently of the bishop; and, in most of the churches, repair not only the church, but the chancel. (Pulling's Laws of London, p. 263.) The legality of such a custom as above mentioned with regard to seats, has however been questioned (See Rogers's Ecc. L. p. 185.)

(*n*) See Steer, P. L. 96.

(*o*) See as to parish clerks in orders, 7 & 8 Vict. c. 59, ss. 2, 3, 4.

(*p*) Canon 91.

(*q*) Ibid. As to the appointment of a parish clerk in parishes united by special act of parliament, see *Hartley v. Cook*, 9 Bing. 728. In churches built under the Church Building Acts, he is to be *annually* appointed by the minister. (See 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; *Pinder v. Barr*, 4 Ell. & Bl. 105; *Jackson v. Courtenay*, 8 Ell. & Bl. 8.) In a parish constituted under the New Parishes Acts, both the clerk and sexton are appointed by the incumbent, and are removable by him, with the consent of the bishop of the diocese, for any misconduct. (19 & 20 Vict. c. 104, s. 9.)

(*r*) 13 Rep. 70; *Jermyn's case*, Cro. Jac. 670; *Peak v. Bourne*, Str. 942.

may be by word of mouth only (*s*): and his remuneration depends altogether upon the custom of the particular parish (*t*). The *sexton* (*u*) is, in the ordinary course, chosen by the incumbent; though sometimes by the parishioners, where a usage to that effect prevails (*x*). His salary depends on custom, and is paid by the churchwardens; his duty is to cleanse the church, to open the pews, to dig the graves for the dead, to provide candles and other necessities, and to prevent disturbance in the church (*y*).

(*s*) *R. v. Inhabitants of Bobbing*, 5 A. & E. 682.

(*t*) *Steer*, P. L. 97. As to the fees and emoluments of the clerk and the sexton, in a parish constituted under the Church Building Acts, see 59 Geo. 3, c. 134, ss. 6, 10.

(*u*) Apparently from *sacristan*, the keeper of things belonging to divine worship.

(*x*) *Rogers's Ecc. L.* p. 834. And see *R. v. Inhabitants of Bobbing*, 5

A. & E. 682; *Causfield v. Blenkinsop*, 4 Exch. 234.

(*y*) *R. v. Inhabitants of Liverpool*, 3 T. R. 119; and see *Shaw's P. L.* 71. Besides the parish clerk and sexton, there is sometimes attached to the church a *beadle*, (from the Saxon *beodan*, to bid,) whose business is to attend the vestry, to give notice of its meetings to the parishioners, and execute its orders, &c. (See *Shaw's P. L.* c. 19.)

CHAPTER II.

OF THE DOCTRINES AND WORSHIP OF THE CHURCH,
AND HEREIN OF THE LAWS AS TO HERESY AND
NONCONFORMITY.

—◆—

THOUGH this nation has constantly adhered to the principle of an established Church,—that is, a church endowed, and (as occasion has required) protected, by the provision of the temporal law—yet no claim was at first made by such law to interfere with the regulation of its faith, ceremonies, or discipline. These matters fell under the exclusive province of the ecclesiastical authorities; who (so long as the spiritual supremacy of the Roman pontiff was acknowledged within these realms) exercised it in accordance with the law of the popes and councils, modified from time to time by our own legatine and provincial constitutions. But at the era of the Reformation it was found necessary to resort to the legislature, for an authoritative exposition of the true Protestant faith, for the establishment of appropriate forms of worship, and for a declaration of the crown's supremacy, in lieu of that of the pope, in matters ecclesiastical; and from this time the power of the ecclesiastical authorities has been exercised in subordination to these paramount institutions of the civil government (*a*).

Accordingly, the *Articles of Faith*, originally forty-two in number, but afterwards reduced to thirty-nine, (and commonly called the *Thirty-nine Articles*,) were framed by Archbishop Cranmer, with the assistance of other

(*a*) Vide sup. vol. I. p. 62.

persons of distinguished learning and piety, in the reign of Edward the sixth; and were reduced to their present form in the convocation of the archbishops and bishops of both provinces, held at London in the reign of Queen Elizabeth, A.D. 1562 (*b*). By these Articles (among other matters) the canonical authority of the different books of the bible was settled—a new version of the Holy Scriptures being afterwards made in the reign of James the first, which is still in use under the denomination of King James's Bible.

The *Form of Prayer and Church Service*, commonly called the *Liturgy*, was also first framed in the reign of Edward the sixth, and by the same prelates (*c*). Prior to the Reformation various liturgies had been in use in different parts of the realm (*d*). But a new ritual (chiefly founded, however, on the antient services), with *rubrics* prescribing the order and form to be pursued, was now compiled, under the direction of that prince, for the uniform observance of the whole reformed Church of England. This ritual (which was, for the most part, the same with our present Book of Common Prayer) was established by statute 2 & 3 Edw. VI. c. 1; and being afterwards revised, was confirmed by 5 & 6 Edw. VI. c. 1, and

(*b*) The first draft of the Articles was made by Cranmer, assisted by Bishop Ridley, in 1551; and after being corrected by the other bishops, Latimer, Hooper, Poynt, Coverdale, &c., they were published in 1553. In 1562, 1571, and 1662, they were successively revised and confirmed. (Adams, *Relig. World Displayed*, vol. i. p. 399.)

(*c*) Adams, *Relig. World Displayed*, vol. i. p. 402.

(*d*) The statute 2 & 3 Edw. 6, c. 1, recites, that “of long time there hath “been had in this realm of England “divers forms of common prayer

“commonly called the service of the
“Church, that is to say, the use of
“Sarum, of York, of Bangor, and of
“Lincoln; and besides the same,
“now of late much more divers and
“sundry forms and fashions have
“been in use in the cathedral and
“parish churches of England, Wales,
“&c.” Almost the whole of our
Liturgy was taken from the forms
here described; particularly from
that of Sarum; and most of it can
be traced to periods before the Con-
quest. See Palmer's *Origines Li-
turgicæ*.

1 Eliz. c. 2; and, after two other successive revisions in the reigns of Kings James the first and Charles the second, was confirmed in its present form by 13 & 14 Car. II. c. 4, usually described as *the Act of Uniformity (e)*.

As to the *Crown's supremacy* in matters ecclesiastical, it was definitively established by 1 Eliz. c. 1, usually called the Act of Supremacy; a statute which, in the first place, provides that no foreign prince or potentate, spiritual or temporal, shall exercise any manner of jurisdiction or privilege, spiritual or ecclesiastical, within this realm or the dominions thereof; and next, that such jurisdictions and privileges as had before been exercised by any spiritual or ecclesiastical power for visitation and correction of the Church, shall for ever be united and annexed to the imperial crown of this realm (*f*).

The new regulations thus introduced by parliament,—taken in connection with other legislative enactments of the same era, but of subordinate importance, and in connection also with the national canon law, (which still gives the rule where these are silent,)—have constituted, from the period of which we speak, and still constitute, the standard of faith, worship, and discipline in the Church of England. And we have seen that for

(*e*) Wats. C. L. p. 321. Some alterations, however, have since been made. For the Church services for some particular days, viz., 30th January, 29th May, 5th November, and 23rd October, were abolished by 22 Vict. c. 2. Moreover, by 34 & 35 Vict. c. 37, the table of lessons contained in the calendar was revised and rearranged in accordance with recommendations of commissioners who had been appointed by her Majesty to report to her on that subject. And by the 35 & 36 Vict. c. 35 (the Act of Uniformity Amendment Act, 1872), in accordance with the report of the convocations of

Canterbury and York (and in conformity with the suggestions of commissioners appointed by her Majesty in 1869), certain modifications were made in the order of prayer for use on any day except Sunday, Christmas-day, Ash Wednesday, Good Friday, and Ascension-day.

(*f*) The supremacy of the Crown had been before declared by 26 Hen. 8, c. 1, and indeed prior to the Reformation, by the Statute of *Præmunire*, 16 Ric. 2, c. 5. As to the supremacy, see also 5 Eliz. c. 1; *Introd.* to 4 Rep.; and 4 Inst. 42, 331, 341.

a beneficed clergyman advisedly to maintain any doctrine in derogation of the king's supremacy, the thirty-nine articles, or the liturgy by law established,—or to neglect to declare his assent publicly in his church to such articles and liturgy at the time appointed for that purpose, or the use of any other form of prayer than is contained in such liturgy,—is ground for deprivation (*g*). It remains, however, to consider on what persons, and in what cases, this standard is to be deemed imperative—whether it is binding merely on those who claim the benefits of the church establishment, or generally on all the subjects of the realm, whatever may be in fact the state of their religious opinions. And here we shall find that the law has passed through changes of a very remarkable description. Though the statute of Elizabeth just cited effected an emancipation from the Papal yoke, and may therefore be justly considered as having laid the foundation of spiritual freedom, it was not till long afterwards that the nation learned the lesson of religious toleration: and our temporal law in the mean time proceeded not only to imitate the persecutions of the Popish time, but in some respects to surpass them: for while it continued to punish as it had long done, (in aid of the ecclesiastical authorities,) the offence of *heresy* (*h*), it began now to exercise new rigours of its own with respect to that of *nonconformity*, or dissent from the worship and ceremonies of the reformed Established Church. And this so early as the 5 & 6 Edw. VI. c. 1, was made highly penal; it being thereby enacted that even to be present at any other form of worship should render

(*g*) Vide sup. pp. 686, 693.

(*h*) With regard to heresy it may be sufficient here to remark that it first became a temporal offence under 2 Hen. 5, c. 7, though the sheriff was, before that Act, bound to carry out the sentence of the

ecclesiastical judge, in obedience to the writ *de hæretico comburendo*. This writ, however, was abolished by 29 Car. 2, c. 9, and heresy again remitted to ecclesiastical correction only *pro salute animæ*.

the offender liable to imprisonment; and by the same statute, and by 1 Eliz. c. 2, s. 14, a fine of twelve pence to be levied by the churchwardens for the use of the poor, was imposed on such as failed to resort to their parish church on all Sundays and holidays. And these enactments, though for a long course of time fallen into neglect, yet remained in our statute book, till, in common with many other penal and disabling laws in regard to religious opinions, they were swept away by the statute 9 & 10 Vict. c. 59, to which we shall make farther allusion before we close this chapter.

In the reign, however, of Queen Elizabeth, a schism began to develop itself in the newly-established Protestant Church. Certain sectaries, who received the appellation of *Puritans*, deserting the use of the liturgy, betook themselves (in defiance of the above enactments) to forms of worship of their own institution (*i*); and ultimately, increasing in number, branched out into various divisions of religious opinion, and various modes of religious ceremonial and Church government. From this stock descended all those Protestant seceders from the Established Church, described at a latter period as *Non-conformists*; and in modern times, as *Dissenters* (*k*).

The jealousies to which these growing innovations gave rise, and the alarm from time to time not unreasonably excited by the enterprising spirit of Popery, gave birth to a variety of enactments, having for their object the

(*i*) Hallam, Const. Hist. vol. i. pp. 246, 251, 280.

(*k*) The most numerous bodies of Dissenters in this country are—1. The *Wesleyan Methodists*; 2. The *Independents*, or *Congregationalists*; and 3. The *Baptists*; but the first and last of these are subdivided into various other denominations. As to the connection between the Baptists and the *Presbyterians*, see Att.-Gen. v. Bunce, Law Rep., 6

Eq. Ca. 563. From a Report “on Church Rate,” by a committee appointed by the House of Lords in 1859, it appears that the population of England and Wales at that date might be distributed in the following proportions:—Churchmen, 67 per cent.: Wesleyans, 13 per cent.: Independents, &c., $7\frac{1}{4}$ per cent.: Baptists, $2\frac{1}{2}$ per cent.: other Sects, Jews, &c., $6\frac{3}{4}$ per cent.: and Roman Catholics, $3\frac{1}{2}$ per cent.

repression of Non-conformity and the discouragement of Papists. Thus, by the Act of Uniformity (13 & 14 Car. II. c. 4), it was enacted, that the book of Common Prayer should be used in every place of public worship; and that every teacher of youth should make a written declaration that he would conform to the Liturgy, and obtain from the ordinary a *licence* to teach. And another measure of the same reign was an Act against Conventicles, 22 Car. II. c. 1, by which all meetings consisting of five persons or more, (exclusive of the family,) assembled for the exercise of religion in any manner other than according to the liturgy and practice of the Church of England, were prohibited, and subjected to pecuniary forfeitures.

The Revolution of 1688, however, was the commencement of an era of more liberal legislation in matters of religion, as well as politics; and by the Toleration Act, 1 W. & M. st. 1, c. 18, persons dissenting from the Church of England (except Papists and persons denying the Trinity) were allowed freely to assemble for religious worship according to their own forms, and in places of meeting duly certified (*l*),—on condition of their taking the oaths of allegiance and supremacy, and making a declaration against transubstantiation, and (in the case of dissenting *ministers*), subscribing also to certain of the Thirty-nine Articles.

In the same spirit of toleration it was afterwards provided by 19 Geo. III. c. 44, that dissenting preachers or teachers might be entitled to the benefits of the Toleration Act (without signing any of the Articles), on subscribing a declaration professing themselves to be Christians and Protestants, and a belief that the Scriptures contain the revealed will of God, and are the rule of doctrine and practice; and the same statute relieved

(*l*) The Toleration Act has been amended in regard to the mode of registration of dissenting places of worship, by 18 & 19 Vict. c. 81. See also 19 & 20 Vict. c. 119, ss. 17, 27.

dissenters in general, on those conditions, from the prohibitory requirements of the Act of Uniformity in reference to the teaching of youth (*m*). Then followed the 52 Geo. III. c. 155, by which dissenters were relieved from the necessity of taking any oaths or subscribing any declaration, unless required so to do by some justice of the peace (*n*). And in the next year was passed the statute 53 Geo. III. c. 160, by which that clause of the Toleration Act, which excepted persons *denying the Trinity* from the benefit of its enactments, was repealed (*o*).

And we may add in conclusion, that in order to render the benefits of the Universities of Oxford, Cambridge, and Durham, freely accessible to the nation, it has now been thought proper to remove the restrictions, tests, and disabilities which still operated so as to debar some of her Majesty's subjects from their full enjoyment. This has been accomplished by the 35 & 36 Vict. c. 26, which enables any person to take any degree (other than a divinity degree,) in any of the above universities, and to hold any office therein, or in any college thereof, without either subscribing any article or formulary of faith, or making any declaration or taking any oath respecting his religious belief or profession, or conforming to any religious observance, or attending or abstaining from any form of public worship, or belonging to any specified church, sect, or denomination.

We have hitherto chiefly confined our view to the progress of toleration in regard to Protestant dissenters. As respects the subjects of this realm who profess the Roman Catholic religion, by statutes 18 Geo. III. c. 60, 31

(*m*) See also 9 & 10 Vict. c. 59.

(*n*) By this statute the previous Conventicle Act, 22 Car. 2, c. 1 (as to which, vide sup. p. 707) is repealed.

(*o*) By 7 & 8 Vict. c. 45, the

benefits of 1 W. & M. sess. 1, c. 18; 19 Geo. 3, c. 44; and 53 Geo. 3, c. 160, are extended to endowments for Dissenters made prior to those Acts, and which at the time when so made were unlawful.

Geo. III. c. 32, and 43 Geo. III. c. 30, most of the severer penalties and disabilities to which these were at one time subject were removed on condition of their taking such oaths and declarations as in those Acts provided (*p*); and, in particular, assemblies for Roman Catholic worship were legalized on condition of their being held in places duly certified (*q*): and at length by 10 Geo. IV. c. 7, commonly called the Catholic Emancipation Act (*r*), the subjects of this realm who profess the Roman Catholic religion were enabled (*s*) to exercise any franchise or civil right whatever, except in certain cases where their doing so would presumably be prejudicial to Protestantism, as in the case of presenting to a benefice (*t*). They may now also, since the above statute, hold any office whatever, with the exception of the following: viz., the office of guardian or regent of the united kingdom; of lord chancellor, or keeper of the great seal; of lord lieutenant, or other chief governor of Ireland (*u*); of high commissioner to the general assembly of the Church of Scotland; or any office in the Church of England, or in the Church of Scotland, or in the ecclesiastical courts, or in the universities, colleges, or public schools of this kingdom (*v*).

But inasmuch as even after the Catholic Emancipation Act, doubts were entertained as to the right of Roman Catholic subjects in England to acquire and hold, in real estate, the property necessary for religious worship, and for educational or charitable purposes,—it was afterwards, by another Act of the 2 & 3 Will. IV. c. 115, provided that in these matters they should be placed on the same footing, and subject to the same laws

(*p*) See 4 Bl. Com. p. 55.

(*q*) See 18 & 19 Vict. c. 81, s. 2.

(*r*) See the effect of this Act discussed in the case of the Earl of Shrewsbury v. Scott, 6 C. B. (N. S.) 177.

(*s*) See also to the same effect

the statute, 30 & 31 Vict. c. 62.

(*t*) See 10 Geo. 4, c. 7, s. 16.

(*u*) As to the office of *Lord Chancellor* of Ireland, see now 30 & 31 Vict. c. 75.

(*v*) See 10 Geo. 4, c. 7, ss. 12, 16, 17.

as were applicable to Protestant dissenters (*x*). And the triumph of toleration, as regards the Roman Catholic subjects of the realm, was consummated by the Acts of 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59, which recite and repeal almost the whole of such enactments as still remained in force (however fallen into oblivion), and were thought calculated in any manner to oppress this portion of the community on account of their religious persuasion.

Before we conclude this chapter, it seems desirable also to take some notice here of that class of persons, who, being born in this realm, profess the *Jewish* religion; for these were formerly subject to many hardships and degradations, and appear to have been scarcely considered in any other light than as aliens (*y*). It is long since any sufferings of this description can be said to have fallen to their share; but they, nevertheless, remained till recently liable to some peculiar disqualifications, most of which, however, have been now removed (*z*). Yet a subject professing the Jewish faith is still under the following disabilities, viz., that of being incompetent to fill certain high offices in the state, from which (as we have seen) Roman Catholics also are excluded (*a*); and of being unable to present to an ecclesiastical benefice, the right to appoint to which belongs to any office in her Majesty's gift, which he may happen to fill (*b*).

Thus amply has the law at length provided for the freedom of religious opinion (*c*). In all other respects,

(*x*) See also 23 & 24 Vict. c. 134, by which provisions are made for mitigation of the law relative to *charitable trusts* connected with the Roman Catholic religion.

(*y*) See 2 Inst. 507.

(*z*) See 9 & 10 Vict. c. 59; 18 & 19 Vict. c. 86, s. 2; 21 & 22 Vict. c. 49; 29 & 30 Vict. c. 22; 23 & 24 Vict. c. 63. It may be remarked

here that a person who professes the Jewish religion is enabled by 34 & 35 Vict. c. 19, to carry on certain kinds of work on a *Sunday*, provided the workshop or manufactory is closed on Saturday until sunset, and is not open for traffic on Sunday.

(*a*) Vide sup. p. 709.

(*b*) 21 & 22 Vict. c. 49, s. 4.

(*c*) Among the statutes *connected*

however, the rights and pre-eminence of the Established Church have been hitherto maintained inviolate; and though no longer upheld by penal laws against non-conformity, she retains, in full possession, all those dignities and endowments which, at the period of the Reformation, were allotted exclusively to her ministers.

with this subject, may be ranked the 1 & 2 Vict. c. 105, by which an oath lawfully administered to any person on any occasion whatever is allowed to be binding, provided it be administered in such form and with such ceremonies as he declares to be binding. And the provision contained in the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), allowing any person called as a *witness*, or required or desiring to make an affidavit or deposition, who shall refuse or be unwilling from alleged

conscientious motives to be sworn, to obtain from the court, (on its being satisfied of the sincerity of the objection,) permission to make solemn affirmation or declaration instead. (Sect. 20.) The statute last mentioned applied only to the *civil* courts, but by 24 & 25 Vict. c. 66, a similar relief is now given in courts of *criminal* jurisdiction, and by 30 & 31 Vict. c. 35, s. 8, has been since extended to *jurors*, in both civil and criminal cases.

CHAPTER III.

OF THE ENDOWMENTS AND PROVISIONS OF THE
CHURCH.

THE endowments and provisions of the Church consist of lands, advowsons, and tithes; all of which have been at different times annexed to ecclesiastical preferments by the munificence of antient or modern donors; and the last are incident of common right to every parochial church. But in almost every parish the tithes have now been commuted (as will be presently explained) into a rent-charge,—which must be considered as in some measure a different species of endowment,—though it is the representative and equivalent for tithe, and subject in many respects to the same legal incidents (*a*).

These church endowments we propose to consider, first, as regards the subject of property itself; secondly, as to the estates which ecclesiastical persons, as such, may hold therein; thirdly, as to the power of alienation in regard to them which they are competent to exercise.

I. As regards the subject of property.

We may observe, in the first place, that the boundaries of church lands are often subject to great uncertainty; and therefore by 2 & 3 Will. IV. c. 80—reciting that the dignitaries of the different cathedral and collegiate churches and chapels of England and Wales, and the societies of the colleges and halls of Cambridge and Oxford and Win-

(*a*) See 6 & 7 Will. 4. c. 71, s. 71.

chester and Eton, are proprietors of divers manors, messuages, lands, tithes and hereditaments, and that in many cases the boundaries or quantities and identity of such property are disputed,—it is provided that it shall be lawful for any of them (with such consent or consents as in the Act mentioned,) to agree with their tenants or under-tenants, or the owners of adjoining hereditaments, that any such disputed matters shall be referred to arbitration.

We may remark, too, that in most benefices there is an official house of residence, which he is bound to keep in repair. And not only may he be compelled by his bishop to do so during his incumbency, but, if he commits or suffers waste upon it, remedy by his successor may be had against his personal representatives in respect of such *dilapidation*, as it is called: and this remedy may be had either in the ecclesiastical or in the temporal courts (*b*). Numerous provisions, moreover, as before noticed, are made by law, to aid a beneficed clergyman in repairing or rebuilding his house of residence or to provide a new one. The methods of doing this, are by enabling such incumbent to raise money to a limited amount, according to the value of the benefice, by mortgage of its profits, or by allowing him to sell or exchange the existing house, in order to obtain another which is more convenient. And by 19 & 20 Vict. c. 50, it is provided, as to advowsons vested in (or in trustees for) *inhabitants*, or other persons forming a numerous class, and deriving no pecuniary advantage therefrom,—that the same may be sold by order of such

(*b*) 13 Eliz. c. 10; 14 Eliz. c. 11, s. 18. As to the action for dilapidations in a court of law, see *Wise v. Metcalfe*, 10 B. & C. 299; *Bird v. Relph*, 2 Ad. & El. 773; *Downes v. Craig*, 9 M. & W. 166; *Bunbury v. Hewson*, 3 Exch. 558; *Warren v. Lugg*, *ib.* 579; *Bryan v. Clay*, 1 Ell. & Bl. 38; *Jenkins v. Betham*, 15 C. B. 168; *Ross v. Adcock*, Law

Rep., 3 C. P. 655. As to the proceedings in the ecclesiastical court, see *Whinfield v. Watkins*, 2 Phil. 3. The statute law relating to ecclesiastical dilapidations and the manner of ascertaining their amount has been recently amended, and will be found in the 34 & 35 Vict. c. 43, amended by 35 & 36 Vict. c. 96.

persons, and the proceeds applied to such beneficial purposes as therein specified, including the erection of a parsonage house if there be none, or the rebuilding, repair or improvement of any house already existing (*c*).

With respect to an incumbent of a living, it is also to be noticed, in connection with this subject, that he is generally seised for his life not only of the rectory or vicarage house, as well as of the edifice of the church itself, but of the *glebe*, i. e. of a portion of land attached to his benefice, as part of its endowment; and by 5 & 6 Vict. c. 54, it is provided that the tithe commissioners shall have power to ascertain and define the boundaries of the glebe lands of any benefice; and, with consent of the ordinary and patron, to exchange them for other lands within the same or any adjoining parish, or otherwise conveniently situated. In rectories, the chancel and the churchyard also, are the freehold of the rector (*d*). In vicarages, the churchyard is the vicar's freehold; the chancel that of the impropriator (*e*). Yet the disposal of the pews and seats in the church appertains, by law (as formerly shown) to the ordinary; and, practically, to the churchwardens, to whom the authority of the ordinary, in this respect, is delegated (*f*). Moreover, no monument can be set up without the ordinary's consent (*g*). And an aisle or side chapel in the church, or a pew in its nave, may be granted, by *faculty* of the ordinary, to an individual and his heirs as appurtenant to a particular messuage in the parish.

(*c*) Advowsons belonging to endowed charities within the provisions of the Charitable Trusts Acts, 1853, 1855, are not within this statute. (19 & 20 Vict. c. 50, s. 1.)

(*d*) See *Clifford v. Wicks*, 1 B. & Ald. 498; *Beckwith v. Harding*, ib. 508; *Rich v. Bushnell*, 4 Hagg. 164; *Churton v. Frewen*, Law Rep. 1 Eq. Ca. 634.

(*e*) *Wats. C. L.* 391. See as to this, *Champneys v. Arrowsmith*,

Law Rep., 2 C. P. 602; 3 C. P. 107.

(*f*) However, it is laid down that the chief pew in the church belongs, as of right, to the rector, or, in the case of a vicarage, to the impropriator. (See *Rogers's Ecc. L.* 171, 179; *Clifford v. Wicks*, ubi sup.; sup. p. 699.)

(*g*) *Beckwith v. Harding*, ubi sup.; *Rich v. Bushnell*, ubi sup.

Indeed a man may prescribe for these, as so appurtenant, without showing a faculty (*h*).

Among the subjects of church property we enumerated *advowsons* and *tithes*; and to these it will now be proper to devote a more particular attention.

1. And, first, as to *Advowsons*.—Advowsons are of the class of hereditaments incorporeal; but were simply mentioned, without being discussed, in that part of the first volume allotted to that class of property (*i*); because their close connection with the law of the Church seemed naturally to assign them to the present division of our work (*k*).

An advowson, *advocatio*, is the right of presentation to a rectory, vicarage, or other ecclesiastical benefice; and this word, which signifies *in clientelam recipere*, the taking into protection, is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church (*l*). For, in antient times, when lords of manors built churches on their own demesnes, endowed them with glebe, and appointed those tithes to be paid to the ministers thereof, which before were given to the clergy in common,—from whence arose the division of parishes,—he who thus built and endowed a church had of common right a power annexed of nominating any person (provided he were canonically qualified) to officiate in that church, of which such lord of the manor was the founder, endower, maintainer, or, in a word, the patron (*m*). And this power is, by derivation of title

(*h*) Wats. C. L. 643, 644; 2 Bl. Com. 429. As to the law of Jews, see *Parker v. Leach*, Law Rep., 1 P. C. 312. Reference may be here made to recent provisions by which a person giving land to be added to any *consecrated churchyard* may reserve a portion thereof in perpetuity of burial, and of placing monuments and gravestones thereon. See

30 & 31 Vict. c. 133, amended by 31 & 32 Vict. c. 47.

(*i*) Vide sup. vol. I. p. 648.

(*k*) As to the law and origin of advowsons, see *Rennell v. Bp. of Lincoln*, 3 Bing. 223; 7 B. & C. 113; *Mirehouse v. Rennell*, 8 Bing. 490.

(*l*) 2 Bl. Com. p. 21.

(*m*) Vide sup. vol. I. p. 118 et seq.; 1 Bl. Com. p. 113; Co. Litt.

from the lords of manors, now claimed by many other private persons; and by many corporations, both lay and ecclesiastical(*n*). But it is to be observed, that neither an alien (unless he be naturalized), nor a person who professes the Roman Catholic faith, is in a position to exercise the rights of a patron, and present to a living; for if the former purchase an advowson and a vacancy should occur, the crown shall present(*o*); if the latter, the University of Oxford or of Cambridge(*p*). And if a person professing the Jewish religion shall hold any office in the gift of the crown, to which belongs the right of presentation to any ecclesiastical benefice, such right will devolve upon the Archbishop of Canterbury for the time being(*q*).

[Advowsons are either *appendant* or *in gross*. Lords of manors being originally the only founders, and of course the only patrons, of churches(*r*), the right of patronage or presentation, so long as it continues annexed to the possession of the manor—as some have done from the foundation of the church to this day—is called an advowson appendant(*s*); and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words(*t*).] But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson *in gross* or at large; being annexed no longer to the

119 b; Gibs. Cod. 7, 57, 2nd edit. This original of the *jus patronatus*, viz. building and endowing the church, appears also to have been allowed in the Roman empire. (Nov. 26, t. 12, c. 2; Nov. 118, c. 23.)

(*n*) Municipal corporations, however, are disabled from exercising, in their *corporate* capacity, any church patronage. (See 5 & 6 Will. 4, c. 76, s. 139; 6 & 7 Will. 4, c. 77,

s. 26; and 1 & 2 Vict. c. 31.)

(*o*) Watson, Clerg. Law, 105.

(*p*) Rogers, Ecc. L. 17; 3 Jac. 1, c. 5; 1 W. & M. st. 1, c. 26; 12 Ann. st. 2, c. 14, s. 1; and see Edwards v. Bishop of Exeter, 5 Bing N. C. 654.

(*q*) 21 & 22 Vict. c. 49, s. 4.

(*r*) Co. Litt. ubi sup.

(*s*) Ibid. 121.

(*t*) Ibid. 307.

manor or lands, but to the person of the owner (*u*). And where the inheritance either of the manor or the advowson has been thus separately conveyed, the advowson remains for ever in gross, and cannot be appendant any more (*x*). When thus in gross, it may be conveyed in the same manner as any other incorporeal hereditament (*y*). But not only the advowson itself, but the next or any number of future *presentations* may, during an existing incumbency, be conveyed by the owner (*z*); and the grantee of a next presentation becomes, *pro hac vice*, the patron. And as to either species of patron, this rule is to be observed, that if he dies after a vacancy has happened, and before it is filled up, the right to present for the then next turn, (being as it were a fruit fallen,) is considered as personal, not real estate, and goes to his executor, and not to his heir (*a*). The exercise of his right, by a patron of either description, is also subject to the restrictions imposed by the law of *lapse*, and by the law of *simony*.

[As to *Lapse*, it is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary, by neglect of the patron to present; to the metropolitan, by neglect of the ordinary; and to the crown, by neglect of the metropolitan. For, it being for the interest of religion and the good of the public, that the church should be provided with an officiating minister, the law has, therefore, given this right of lapse in order to quicken the patron, who might otherwise suffer the church to remain vacant (*b*).

The term, after which the title to present by lapse accrues from the one to the other successively, is six

(*u*) Co. Litt. 120.

(*x*) 2 Bl. Com. 22.

(*y*) Vide sup. vol. I. p. 683.

(*z*) Co. Litt. 249 a; Plowd. 150; Crisp's case, Cro. Eliz. 164; Elvis v. Abp. of York, Hob. 322; Alston v. Atlay, 7 A. & E. 289; and see Rogers, Ecc. L. 9.

(*a*) Rennell v. Bp. of Lincoln, 7 B. & C. 113.

(*b*) The right of lapse was first established in the reign of Hen. 2, at the time (though not by the authority) of the council of Lateran. (See 2 Roll. Ab. 54, in tit. Presentment; Bract. l. 4, tr. 2, c. 3.)

[alendar months, that is, 182 days (*c*); and this, exclusive of the day of the avoidance (*d*). But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (*e*); for the forfeiture accrues whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk (*f*). For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (*g*). For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the crown, prerogative here intervenes and makes a difference; and the patron shall not recover his right till the sovereign has satisfied his turn by presentation; for *nullum tempus occurrit regi* (*h*).

In case the benefice becomes void by death, or by reason of plurality (*i*), the patron is bound at his own peril to take notice of the vacancy; and the six months

(*c*) Wats. C. L. 109; Bp. of Peterborough v. Catesby, Cro. Jac. 166; 2 Inst. 360; Catesby's case, 6 Rep. 62; Regist. 42.

(*d*) 2 Inst. 231; Wats. ubi sup.

(*e*) Gibs. Cod. 769.

(*f*) 2 Inst. 273.

(*g*) 2 Roll. Ab. 368.

(*h*) Doctor and Student, d. 2, c. 36; R. v. Abp. of Canterbury, Cro. Car. 355.

(*i*) As to cession through plurality, vide sup. p. 691.

[date from its occurrence (*k*); for these are matters of equal notoriety to the patron and ordinary (*l*). But in case of a vacancy by resignation or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron (*m*). And, in this case, the six months shall date only from the time when such notice shall in fact be given (*n*). Though as to this, a distinction is made in the case of an *ecclesiastical* patron, who is held not entitled to notice of insufficiency, because he is competent to choose an able clerk (*o*). Neither shall any lapse accrue to the metropolitan or the sovereign in cases where the bishop is precluded, by his having neglected to give notice to the patron, from himself presenting (*p*). For it is universally true, that neither the archbishop nor the crown shall ever present by lapse, but where the immediate ordinary might have collated by lapse within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* (*q*). If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned, or notice given, he is styled a disturber, by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong (*r*). Also, if the right to presentation be litigious and contested, and an action be brought to try the title, making the bishop a defendant, no lapse shall incur until the question of right be decided (*s*).]

As to *Simony*, this, also, is a cause of forfeiture,

(*k*) See Wats. C. L. 5; Rogers, Ecc. L. 488.

(*l*) 2 Bl. Com. p. 278.

(*m*) Vide sup. p. 685.

(*n*) 2 Burn, Ecc. L. 157.

(*o*) 2 Roll. Ab. 364; 2 Burn, ubi sup.

(*p*) 2 Bl. Com. ubi sup.

(*q*) Co. Litt. 344, 345.

(*r*) Co. Litt. ubi sup.

(*s*) Bl. Com. ubi sup.; Wats. Ch. L. 112; 2 Burn, Ecc. L. 358; Rogers, ubi sup.

whereby the right of presentation is forfeited and vested *pro hac vice* in the crown. Simony properly means the corrupt presentation of any person to an ecclesiastical benefice, for money, gift, or reward (*t*). And several acts of parliament have been passed to restrain the practice.

Thus, by the statute 31 Eliz. c. 6, it is provided, that if any patron, for money or reward, or promise of money or reward, shall present a person to any benefice with cure of souls or other ecclesiastical benefice or dignity, not only shall both giver and taker be fined, but such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice, and the crown shall present to it for that turn. But it is on the other hand enacted by stat. 1 W. & M. c. 16, that such simoniacal contract shall not prejudice any innocent patron in reversion, on pretence of a lapse to the crown or otherwise, unless the presentee, or his patron, was convicted in the lifetime of such presentee of the offence of simony. Again, by the statute 12 Anne, st. 2, c. 12 (*u*), if any person, for money or reward, or promise of money or reward, shall procure the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the offender made subject to all the ecclesiastical penalties of simony, —is disabled from holding the benefice, and the presentation devolves to the crown. And, by the modern Act of 28 & 29 Vict. c. 122, every person instituted or collated to any benefice, or licensed to any perpetual curacy, lectureship or preachingship, must (as we have seen) previously make and subscribe, in addition to the other declarations required by that statute, a declaration that he has not committed simony (*v*).

(*t*) Baker v. Rogers, Cro. Eliz.
790.

(*u*) Sometimes cited 13 Anne,
c. 11.

(*v*) Vide sup. p. 686.

Many questions have arisen in our courts with regard to what is, and what is not, simony; and, among others, these points seem to be clearly settled. 1. That the sale of an *advowson*, (whether the living be full or not,) is not simoniacal, unless connected with a corrupt contract or design as to the next presentation (*x*). 2. That to purchase a next *presentation*, the living being actually vacant, is simony; this being expressly in the face of the statute (*y*). 3. That for a *clerk* to purchase, either in his own name or another's, the next presentation, and be thereupon presented at any future time to the living, is simony (*z*). But 4, a bargain by *any other* person for the next presentation, (even if the incumbent be *in extremis*,) if without the privity, and without any view to the nomination, of the particular clerk afterwards presented, is not simony (*a*). 5. That if a simoniacal contract be made with the patron, the clerk presented not being privy thereto, such presentation indeed cannot take effect, but shall devolve to the crown, as a punishment of the guilty patron (*b*); but the clerk who is innocent, does not otherwise incur any disability or forfeiture (*c*). In addition to these points, we may notice that it has been a frequent practice for the patron to take from the presentee an engagement (usually called a *resignation* bond) to resign the benefice at a future period; and, at one period, all such engagements were void, as being simoniacal (*d*). Such a contract is now, however, to a

(*x*) As to sale of an advowson see Bac. Ab. tit. Simony, 189; Grey v. Hesketh, Ambl. 268; Barret v. Glubb, 2 Bl. Rep. 1052; Bishop of Lincoln v. Wolforstan, 2 Wils. 175; 3 Burr. 1504, S. C. in error; Greenwood v. Bishop of London, 5 Taunt. 745; Fox v. Bishop of Chester, 6 Bing. 1; Alston v. Atlay, 6 Nev. & M. 686.

(*y*) Baker v. Rogers, Cro. Eliz.

788; Moor. 914, S. C.

(*z*) Winchcombe v. Bp. of Winchester, Hob. 165.

(*a*) Fox v. Bishop of Chester, ubi sup.; 3 Bligh, N. S. 123, S. C.

(*b*) See Whish v. Hesse, 3 Hagg. 659.

(*c*) 2 Bl. Com. p. 280; 3 Inst. 154; R. v. Bishop of Norwich, Cro. Jac. 385.

(*d*) See Dashwood v. Peyton, 18

certain extent, sanctioned by law. For by 9 Geo. IV. c. 94, a written promise to resign shall be valid, if made to the intent (manifested by the terms of it) that some particular nominee, or one of two nominees, shall be thereupon presented. But this is subject, however, to these provisions: first, that where there are two nominees, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew, of the patron; secondly, that the writing shall in all cases be deposited, within two months after its date, with the registrar of the diocese, and be open to public inspection; and, thirdly, that the resignation made in pursuance of such engagement shall be followed by a presentation, within six months, of him therein named as the person for whose benefit it is made.

2. Secondly, as to *Tithes*.—These are a species of incorporeal hereditaments (*e*); and are capable of being held either by laymen, or by the clergy in right of their churches. And it is to the latter indeed that they properly and usually belong (*f*); for when tithes are owned by a layman it is in the character of impropriator; the origin and nature of whose right to the property of the Church, has been explained in a former chapter (*g*).

Tithes are the tenth part of the increase, yearly arising from the profits and stock upon the lands, and on the personal industry of the inhabitants of the parish: the first species being usually called *prædial*, as of corn, grass, hops (*h*), and wood (*i*); or *mixed*, as of wool, milk (*k*), pigs, &c. (*l*): the other *personal*, as of manual

Ves. 37; Jac. & Walk. 283; Bishop of London *v.* Ffytche, 1 East, 487, (u.); Fletcher *v.* Lord Sondes, 3 Bing. 502; 5 B. & Ald. 835, S. C.

(*e*) Vide sup. vol. I. p. 648.

(*f*) Bac. Ab. Tythes, (E).

(*g*) Vide sup. p. 679.

(*h*) As to title of hop grounds and market gardens, see Trimmer

v. Walsh, 4 B. & Smith, 18.

(*i*) 1 Roll. Ab. 635; 2 Inst. 649. As to the manner of taking tithes of *turnips*, see 5 & 6 Will. 4, c. 75.

(*k*) As to this tithe, see Fisher *v.* Birrell, 2 Q. B. 239.

(*l*) Roll. Abr. ubi sup.; 2 Inst. ubi sup.

occupations, trades, fisheries, and the like. Of prædial and mixed tithes the tenth must be paid in gross; but of personal tithes only the tenth part of the clear profits is due; nor are tithes of this kind generally due at all, except so far as the particular custom of the place may authorize the claim (*m*). [From the above definition it may be inferred, that whatever is of the substance of the earth, or is not of annual increase, as stone, lime, chalk and the like, is not in its nature titheable: nor is tithe demandable, except by force of special custom, in respect to animals *feræ naturæ*.

The establishment of tithes in the Christian Church is generally ascribed to the fourth century, though we cannot precisely ascertain the time when they were first introduced into this country (*n*). Possibly they were contemporary with the planting of Christianity among the Saxons by Augustin the monk, about the end of the sixth century. But the first mention of them, perhaps, in any written English law, is in a decree made in a synod held A.D. 786, wherein the payment of tithes to the Church in general is strongly enjoined (*o*). This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators and people: which was a very few years later than the time that Charlemagne established the payment of them in France (*p*), and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy (*q*).

The next authentic mention of tithes is in the *feodus Edwardi et Guthruni*; or the laws agreed upon between

(*m*) Roll. Abr. 635; 2 & 3 Edw. coln, 7 Barn. & Cress. 153.
6, c. 13; 7 Bro. P. C. 3; Com. Dig.

(*o*) Selden, c. 8, s. 2.

Dismes (E. 3).

(*p*) A.D. 778.

(*n*) See Rennell v. Bp. of Lin-

(*q*) Seld. c. 6, s. 7.

[king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between these monarchs, which may be found at large in the Anglo-Saxon laws(*r*); wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and accordingly we find the payment of tithes not only *enjoined*, but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan about the year 930(*s*).

For some time after the introduction of tithes into this country, though every man was obliged to pay tithes in general, yet (as hath been formerly observed) he might give them to what priests he pleased(*t*), which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common(*u*). But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first, by common consent or the appointment of lords of manors, and afterwards by the written law of the land(*x*).

However, arbitrary consecrations of tithes took place again afterwards and became in general use till the time of King John(*y*); which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors, who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves,) and were then in

(*r*) See Wilkins, *Leges Anglo-Sax.* p. 51.

(*s*) Wilk. *ubi sup.*; LL. Athel. c. 1.

(*t*) Vide *sup.* vol. I. p. 118.

(*u*) Seld. c. 9, s. 4; 2 Inst. 646; Slade v. Drake, Hob. 296.

(*x*) LL. Edgar. c. 1 and 2;

Canut. c. 11. See 1 & 2 Will. 4, c. 45 (extended by 28 & 29 Vict. c. 42), as to the annexation by a rector or vicar of any part of his tithes to any chapel of ease, parochial chapel or district church within the limits of the rectory or vicarage.

(*y*) Seld. c. 11.

[hopes to have drawn, by sanctimonious pretences of extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks ; or grant them to some abbey already erected : since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent the third about the year 1200, in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran (*z*). And this has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran, held A.D. 1179 (*a*), which only prohibited what was called the *infeudation* of tithes, or their being granted to mere laymen (*b*) ; whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same Pope in other countries (*c*). This epistle, says Sir Edward Coke, bound not the lay subjects of this realm ; but, being reasonable and just, it was allowed of, and so became *lex terræ* (*d*). And it put an effectual stop to all the arbitrary consecrations of tithes ; except some footsteps, which still continue in those *portions* of tithes, as they are called, which the parson of one parish hath,

(*z*) Opera Innocent. III. tom. 2, p. 452.

(*a*) See Steel v. Houghton, 1 H. Bl. 52.

(*b*) Decretal. l. 3, t. 30, c. 19.

(*c*) Ib. cc. 2, 6.

(*d*) 2 Inst. 641.

[though rarely, a right to claim in another (*e*). For it is now universally held that tithes are due of common right to the parson of the parish, unless there be a special exception.] In some cases, indeed, the vicar, as well as the rector, is entitled to some part of the tithes (*f*); but all tithes, *primâ facie*, and by presumption of law, belong to the latter; except such as can be shown, by evidence, to belong to the vicar (*g*). Such evidence may consist either of a deed of endowment, vesting certain tithes in the vicar; or of such proof of long usage as is sufficient to raise the presumption that an endowment of that description, though now lost, was antiently made (*h*). It sometimes happens that an endowment vests all the “small” tithes *co nomine* in the vicar (*i*); and this raises the question what are *small* and what *great* tithes—to determine which, no clear line of demarcation seems ever to have been drawn. Yet tithes “mixed and personal” are universally agreed to fall always under the former denomination (*k*); and tithes of corn, hay and wood are generally comprised under the latter (*l*).

We have observed that tithes are due to the parson of common right, unless by special exception. Let us therefore now see who may be exempted from their payment.

[And here, first, we may notice, that some persons are exempt by personal privilege. Thus the crown by its prerogative is discharged from all tithes (*m*). So a vicar

(*e*) 2 Inst. 641, 653.

(*f*) Vide sup. p. 681.

(*g*) Daws v. Benn, 1 B. & C. 763;

2 Bligh, N. S. 83

(*h*) Jackson v. Walker, Gwill.

1231; 2 Bligh, N. S. 94, 103.

(*i*) Bac. Ab. Tithes, (K).

(*k*) Ibid.

(*l*) Com. Dig. Dismes, G. 1.

Small tithes are sometimes called *privy* tithes. (See Clce v. Hall, 7 C. & F. 744.)

(*m*) Wright v. Wright, Cro. Eliz. 511. According to other authorities, however, the crown is not discharged, except by special prescription. (Bac Ab. Tithes (Q) 1; Hardr. 315.)

[shall pay no tithes to the rector, nor the rector to the vicar; the maxim in such cases being that *ecclesia decimas non solvit ecclesiæ* (*n*). But these privileges are not annexed to the land, but personally confined to the crown and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable (*o*).]

Next, spiritual corporations, (as monasteries, abbots, bishops, and the like,) were always capable of having their lands totally discharged of tithes in various ways (*p*). And if a man can show his lands to have been formerly abbey lands, immemorially discharged of tithes, this is still a good exemption (*q*).

[Again, any owner of lands may claim an exemption, either partial or total, from tithes in respect thereof, by reason of a *real composition*; which is an agreement made between such owner and the incumbent, with the consent of the ordinary and the patron, that the lands shall, for the future, be discharged from payment of tithes, by reason of some land or other *real* recompence given in lieu and satisfaction thereof (*r*).] And by 2 & 3 Will. IV. c. 100, s. 2, it was enacted, that every composition for tithes, which had at that date been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron and incumbent were parties, and which had not been since set aside or departed from, should be held valid in law.

[Moreover all persons, spiritual or lay, may claim by custom a *modus*, that is a partial exemption from tithes, which is where, by immemorial usage (which is evidence of a real composition at one time made), a particular

(*n*) *Blinco v. Marston*, Cro. Eliz. 479; *Wright v. Wright*, Cro. Eliz. 511; Sav. 3; Moore, 910, S. C.

(*o*) *Blinco v. Marston*, ubi sup.

(*p*) *Wright v. Gerrard*, Hob. 309.

(*q*) See 2 Black. Com. 31, where

it is added, that "from this original have sprung all the lands which, being in lay hands, do at present claim to be tithe free."

See also 2 & 3 Vict. c. 62, s. 11.

(*r*) 2 Inst. 490; 13 Rep. 40.

[manner of tithing has been allowed, different from the payment of one-tenth of the annual increase. Such customary mode of tithing, or *modus decimandi*, is sometimes a pecuniary compensation; as twopence per acre for the tithe of land: sometimes it is a compensation in work and labour; as that the parson shall have only the twelfth cock of hay and not the tenth, in consideration of the owner's making it for him; sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity when arrived to greater maturity; as a couple of fowls in lieu of tithe eggs: and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*.

To make a good and sufficient *modus*, the following rules must be observed; 1. It must be *certain* and *invariable(s)*. 2. The thing substituted for tithe must be beneficial to the *parson* himself(*t*); thus a *modus* to repair the *church*, in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parson. 3. It must be something *different* from the thing compounded for(*u*). One load of hay in lieu of *all* tithe hay is no good *modus*; for no parson would *bonâ fide* make a composition to receive less than is due in the same species of tithe: and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a *modus* for another(*x*). Thus a *modus* of one penny for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle; for tithe is, of common right, due for both; and

(s) *Towerson v. Wiuget*, 1 Keb. 602.(x) *Grysmen v. Lewes*, Cro. Eliz.

(t) 1 Roll. Abr. 649.

446; *Startupp v. Dodderidge*, Salk.(u) *Shepperd v. Penrose*, 1 Lev. 657.

[therefore a modus for one shall not be a discharge for the other. 5. The recompence must be in its nature as durable as the tithes discharged by it,—that is, an inheritance certain (*y*). And therefore a modus that every *inhabitant* of a house shall pay fourpence a year in lieu of the owner's tithes, is no good modus; for possibly the house may not be inhabited, and then the recompence will be lost. 6. The modus must not be too large; which is called a *rank* modus. For as the real composition, which is the supposed foundation for the modus, must be assumed to have been an equitable contract,—if the modus set up is so rank and large as that it beyond dispute exceeds the value of the tithes in the time of Richard the first (the date of legal memory), this modus is *felo de se*, and destroys itself. For as it would be destroyed by any direct evidence to prove its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original (*z*).]

Lastly. Partial or total exemption from tithes may also, under the 2 & 3 Will. IV. c. 100, a statute passed in the year 1832 (amended by 3 & 4 Will. IV. c. 83), be claimed in respect of *long usage*; that is, such usage as can be shown to have lasted for a certain period of time, even though it may have fallen short of immemorial duration (*a*).

Such, in a general point of view, is the state of the law, with respect to tithes. But a system has been in progress since the year 1836 (and has now nearly reached

(*y*) 2 P. Wms. 462.

(*z*) Vide sup. vol. I. pp. 57, 685, in reference to this doctrine as applied to customs in general, and prescription at common law.

(*a*) Tithe claimed by a lay person (not being a corporation sole), or by

a corporation aggregate, may be defeated as the general rule by a usage for thirty years—by an ecclesiastical corporation sole, by a usage (as the general rule) existing throughout sixty-three years.

its final result,) for commutation of this species of property throughout the kingdom into rent-charge; and to this subject it is now time to call the reader's attention (*c*).

The institution of tithes, though venerable from its scriptural origin and its antiquity,—and though entitled so far as the principle of making a competent provision for the ministers of religion is concerned to universal approbation,—is nevertheless, in its specific form, odious to the people, and unsatisfactory to the political economist (*d*). A tax consisting of a fixed proportion of the gross produce is open to this objection: that it takes advantage of increased fertility, while it makes no allowance for increased expenditure; and thus tends to check the spirit of agricultural improvement. It is obvious, too, that the produce of the soil cannot be collected in kind, without much waste and expense to the tithe-owner; nor without the danger of engendering animosities between him and his flock. It is, however, on the other hand, of not less manifest importance to the Church, that the legal provision for its members should be such as to secure to them, upon some steady basis, a competent portion of the necessaries of life; and to make them independent of any fluctuations in the value of money. It was therefore with great wisdom that parliament consented to the adoption of a plan for commuting the tithes of every parish into a rent-charge, the amount of which is to be adjusted annually, according to the average price of corn.

(*c*) More than 12,000 commutations have been already completed, and these virtually include all the tithes of England and Wales. The few cases which still remain unsettled are, for the most part, certain small rent-charges, for the *redemption* (instead of apportionment) of which by the several land-owners, proceedings have been instituted under the provisions of 9 & 10 Vict. c. 73, and

23 & 24 Vict. c. 93, ss. 32—39.

(*d*) It is remarked by Blackstone (vol. ii. p. 24), that though the “divine right” of the clergy to tithes commenced and ceased with the Jewish theocracy, “an honourable and competent maintenance for the ministers of the Gospel” is undoubtedly *jure divino*, whatever the particular mode of that “maintenance may be.”

This measure has been carried into effect by the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, and the various statutes since passed for its amendment (*e*). They provide (in general) that the commutation may be effected in two ways; either by a voluntary parochial agreement entered into by a certain proportion of the parties interested, and confirmed by the board of commissioners to whom this subject has been entrusted (*f*); or else by compulsory award. And for this latter purpose the commissioners were required to take as the basis of the commutation, (but with power to a certain extent, and in certain cases, to depart from it,) the clear average value of the tithes of the parish—or of the composition payable for the same, where they had been compounded for—for the period of seven years, ending Christmas, 1835 (*g*). The payments to the former tithe-owner under such commutation are to be half-yearly, and the amount thereof is to fluctuate according to the price of corn; the machinery for that purpose being as follows:—In January every year, an advertisement is inserted under the authority of the Board of Trade in the London Gazette, stating the average price of British wheat, barley and oats, for the seven years ending on the Thursday before Christmas-day then next preceding (*h*): and every half-year's payment by each parish is to vary so as always to equal the then value (according to the prices as ascertained by the annual advertisement next preceding such half-year's payment) of the number of bushels of wheat, barley and oats, in equal shares, which could have been purchased according to the prices advertised in January, 1837, by

(*e*) These are 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 23 & 24 Vict. c. 93; 36 & 37 Vict. c. 42.

(*f*) 6 & 7 Will. 4, c. 71, s. 2. This

Board has been since consolidated with that of the Inclosure and of the Copyhold Commissioners. Vide sup. vol. I. p. 643, n. (*h*).

(*g*) 6 & 7 Will. 4, c. 71, s. 37.

(*h*) Sect. 56.

the sum (or rent-charge) for which the parish tithes were commuted (*i*).

As to the respective liabilities of the different land-owners of the parish in respect of such total rent-charge, provisions are made for the *apportionment* thereof under the superintendence of the commissioners, among the parish lands, having regard to their average titheable produce and productive quality (*k*); and after such apportionment has been confirmed, such lands are to be absolutely discharged from the payment of tithes, and instead thereof shall be liable for their portion of the rent-charge (*l*).

It is to be observed in conclusion that unless by special provision in some parochial agreement, approved by the commissioners, the Acts do not extend to any Easter offerings, mortuaries, or surplice fees, nor to tithes of *fish*, nor (in general) to *personal* tithes, nor to *mineral* tithes (*m*). It follows, therefore, that notwithstanding the new system the former tithe law still retains some importance, and requires to be noticed in our law books. But, on the other hand, some branches of the former law (of which we have endeavoured to give some general idea) will for all practical purposes be superseded. For it is provided by the Commutation Acts, that if any question shall arise as to any composition real, modus, or exemption from tithe, in respect of any of the lands or produce

(*i*) 6 & 7 Will. 4, c. 71, s. 67; 3 & 4 Vict. c. 15, s. 20.

(*k*) 6 & 7 Will. 4, c. 71, ss. 33, 54.

(*l*) Sect. 67. As to *alteration* of apportionments, see 23 & 24 Vict. c. 93, ss. 15—17.

(*m*) 6 & 7 Will. 4, c. 71, s. 90; 2 & 3 Vict. c. 62, s. 9. There are also excluded from the Commutation Acts (unless by special agreement as above), payments in lieu of tithes in London, or *ad valorem* tithe payments in any city or town under

any custom or private Act, or any tithes commuted or extinguished under any former statute, (but in case such payment or commutation under a local Act was by way of *variable corn rent*, see 23 & 24 Vict. c. 93.) As to parishes in the *City of London*, see 37 Hen. 8, c. 12; 22 & 23 Car. 2, c. 15; 44 Geo. 3, c. lxxxix.; 1 Geo. 4, c. lix.; 4 Geo. 4, c. cxviii.; 6 Geo. 4, c. clxxvi.; 7 Geo. 4, c. liv. and c. cxv.

thereof in any parish, such question shall be settled in the manner therein provided: and that due allowance shall be made in the parochial agreement, or award of the commissioners, (as the case may be,) for every modus or exemption that shall be so established (*n*).

II. With regard to the estates which the clergy in right of their benefices may have in the several descriptions of property above enumerated, it is to be remarked, that their case differs from that of ordinary proprietors, in several particulars. A dean and chapter always constitute a corporation aggregate; and every bishop, rector, vicar, or other holder of an ecclesiastical benefice, a corporation sole: and, consequently, they take lands and hereditaments, when granted to them for the use of the benefice in perpetuity, to hold to them and their *successors*, instead of their *heirs* (*o*). But the estate of a rector or vicar, though perpetual as regards his church, is considered for most purposes, as regards himself personally, an estate for life only, with the fee simple in abeyance (*p*). It is also held, that ecclesiastical persons, on account of their corporate character, cannot be seised, as such, in tail; though they may have an estate determinable upon the death of a person without issue. And for the same reason they cannot in general (and subject to the large exceptions introduced by modern statutes on this subject,) hold any lands that are granted to them, without obtaining a licence of mortmain (*q*).

(*n*) 6 & 7 Will. 4, c. 71, ss. 21, 24, 44, 45; *Barker v. Tithe Commissioners*, 11 Mee. & W. 320.

(*o*) 3 Inst. 202; Co. Litt. 300; Wats. C. L. 372. Vide sup. vol. I. p. 358.

(*p*) Co. Litt. 341 d.

(*q*) Wats. ubi sup. et p. 374. As to the law of mortmain, vide sup. vol. I. p. 454 et seq.; where (p. 461)

certain Acts are particularized, among those which have introduced exceptions from that law. The following additional statutes, (which contain provision as to the taking and holding of lands in certain cases by *ecclesiastical* corporations,) may be enumerated in this place: 29 Car. 2, c. 8; 5 Ann. c. 24, s. 4; 1 Geo. 1, sess. 2, c. 10, ss. 4, 21; 17 Geo. 3,

III. As to the power of alienation which the clergy are competent to exercise in respect of their benefices (*s*).

At common law, though an ordinary tenant for life could make no alienation which would bind longer than while he himself lived (an incapacity to which he is still in general subject), yet some tenants for life, where the fee simple was in abeyance, might, with the concurrence of such as had the guardianship of the fee, make leases of equal duration with those granted by tenants in fee simple—and this, in particular, was the case in regard to incumbents of livings, provided they obtained the consent of the patron and ordinary (*s*). So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. Thus such leases or estates might have been made by archbishops and bishops, with confirmation of the dean and chapter; and by deans, with the confirmation of the bishop and chapter (*t*). And corporations aggregate might have made what estates they pleased in their church or other lands, without the confirmation of any other person whatsoever (*u*). Such were the rules on this subject at common law, but now by several statutes the powers of ecclesiastical persons in regard to alienation have been greatly altered.

And, first, by the *enabling* statute 32 Hen. VIII. c. 28, persons seised *in fee simple* in right of their churches may make leases for three lives or twenty-one years, so as to

c. 53; 43 Geo. 3, c. 107; 51 Geo. 3, c. 115; 56 Geo. 3, c. 52; 7 Geo. 4, c. 66; 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 107, s. 13; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20; 4 & 5 Vict. c. 39; 14 & 15 Vict. c. 104; 21 & 22 Vict. c. 57, s. 2; 22 & 23 Vict. c. 46.

(*s*) Co. Litt. 44; Bac. Ab. Leases, (E.); Vivian v. Blomberg, 3 Bing. N. C. 311.

(*t*) Dean of Ely v. Stewart, 2 Atk. 45; Wats. C. L. c. 44.

(*u*) See 2 Bl. Com. p. 319.

bind their successors, provided they observe the several requisites and formalities prescribed by this statute (*x*).

Next in order of time follows the *disabling* statute, 1 Eliz. c. 19, which enacts, that all grants by archbishops and bishops, shall be void, unless they be for no longer terms than twenty-one years or three lives from the making, and reserve, at the least, the old annual rent (*y*).

Next comes the statute 13 Eliz. c. 10 (explained and enforced by the statutes 14 Eliz. cc. 11 and 14, 18 Eliz. c. 11, and 43 Eliz. c. 29,) which impose restrictions, not existing at the common law, on ecclesiastical corporations—such as cathedrals, collegiate churches, parsons, and other holders of spiritual livings (*z*). From laying all which together, and examining the particular provisions of these statutes, we may collect that (subject to the relaxations introduced by recent Acts) all such corporations are restrained from making any grants or leases of their lands, unless under the following regulations. 1. They must not (as the general rule) exceed twenty-one years, or three lives, from the making. 2. The accustomed rent, or more, must be yearly reserved thereon. 3. Where there is an old lease in being, no concurrent lease can be made, unless where the old one will expire within three years. 4. No lease shall be made without impeachment of waste.

In addition to the restrictions on alienation which have been already mentioned,—the object of which is the protection of the successor,—ecclesiastical persons with the cure of souls are restrained from *charging* their benefices so as to render them liable to the payment of pension or profit thereout, even in their own time ; a provision in-

(*x*) 2 Bl. Com. 319. The 32 Hen. 8, c. 28, applied, also, to persons seised in their own right or in right of their wives, but was repealed by 19 & 20 Vict. c. 120, ss. 32, 35, except so far as it relates to

leases made by persons having an estate in right of their churches.

(*y*) See also 21 Jac. 1, c. 1.

(*z*) Some of the provisions of the Acts extend also to *hospitals* and *colleges*.

tended for the protection of the incumbents themselves (*a*). This is by force of the 13 Eliz. c. 20, a statute which was once repealed by the 43 Geo. III. c. 84, s. 10, but was afterwards revived by 57 Geo. III. c. 99 (*b*). Under this statute of Elizabeth, it has been held that an instrument framed as a lease, but amounting in substance and design to a charge, is illegal and void (*c*); and that not only a direct charge, but an agreement to charge a living, falls under the same consideration (*d*).

Such continued, from the reign of Queen Elizabeth to that of King William the fourth, to be the state of the law in this matter, subject only to partial relaxations from time to time introduced by various acts of parliament (*e*); but in the reign last mentioned, a new series of statutes on the subject of grants or leases by ecclesiastical persons commenced, involving sometimes additional restriction, but more frequently relief from restrictions before existing.

First, by 6 & 7 Will. IV. c. 20 (*f*), relative to the *renewal* of church leases, it is provided, that no ecclesias-

(*a*) See Bac. Abr. Leases (F).

(*b*) *Shaw v. Pritchard*, 10 B. & C. 241. The 57 Geo. 3, c. 99, has been itself in turn repealed by 1 & 2 Vict. c. 106, but without affecting the revival of 13 Eliz. c. 20.

(*c*) *Shaw v. Pritchard*, *ubi sup.*

(*d*) As to this statute see *Flight v. Salter*, 1 B. & Ad. 673; *Newland v. Watkin*, 9 Bing. 113; *Alchin v. Hopkins*, 1 Bing. N. C. 99; *Saltmarshe v. Hewett*, 1 Ad. & El. 812; *Walthen v. Crofts*, 20 L. J. (Exch.) 257; *Hawkins v. Gathercole*, 24 L. J. (Ch.) 332.

(*e*) Among the Acts of this description, prior to 6 & 7 Will. 4, c. 20, are 17 Car. 2, c. 3, s. 7 (revived by 6 Vict. c. 37); 29 Car. 2, c. 8 (extended by 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 107, and 17 & 18 Vict. c. 84); 17 Geo. 3,

c. 53; 21 Geo. 3, c. 66; 55 Geo. 3, c. 147; 1 Geo. 4, c. 6; 5 Geo. 4, c. 89; 6 Geo. 4, c. 8; 7 Geo. 4, c. 66; 5 & 6 Will. 4, c. 76, s. 139. And since the 6 & 7 Will. 4, c. 20, there are (besides the provisions to be presently mentioned in the text) the following:—6 & 7 Will. 4, c. 77, s. 26; c. 104, s. 3; 1 & 2 Vict. c. 31; 17 & 18 Vict. cc. 84, 112; 20 & 21 Vict. c. 13; and also as regards *colleges and hospitals* in particular, 19 & 20 Vict. c. 88; 21 & 22 Vict. c. 44; 22 & 23 Vict. cc. 19, 34; 23 & 24 Vict. c. 59. Some of the enactments in the above group of statutes refer to *lay* as well as to ecclesiastical corporations, but for the most part to those of the latter class.

(*f*) Explained and amended by 6 & 7 Will. 4, c. 64.

tical corporation shall grant any new lease by way of renewal, until one or more of the persons for whose lives it was granted shall be dead: and then only for the surviving life or lives and such new life or lives as shall make up the number of lives, not exceeding three, for which the original lease was granted. And that where the previous lease was for forty, thirty, or twenty-one years, the renewed lease shall not be granted until fourteen, ten, or seven years of the first term shall have expired respectively; and that there shall be no renewal for life, where the original lease was for years only.

Next, it is provided by 5 & 6 Vict. c. 27 (in reference to *farming* leases) that an incumbent may, with consent of his patron and bishop, demise for a term not exceeding fourteen years any part of the glebe or other church land, provided the best rent that can be gotten be reserved quarterly,—that no fine or foregift be taken for the lease,—that the lessee be not made punishable for waste,—and that the lease contain such covenants as to cultivation, management, and other matters, as the Act particularly specifies (*g*). But no lease shall be valid unless there be excepted out of the same the house of residence, and at least ten acres of land lying within five miles of it, and situate most conveniently for occupation by the incumbent (*h*).

It is also enacted by 5 & 6 Vict. c. 108, known as “The Ecclesiastical Leasing Act, 1842,” that in certain cases the lands or houses of a benefice may be demised on an improving and repairing lease for any term, not exceeding *ninety-nine* years. The Act also contains a similar power of leasing, (but for the term of *sixty* years only,) with respect to watercourses, wayleaves, railroads, and other like easements upon or over the property belonging to

(*g*) 5 & 6 Vict. c. 27, s. 1. In certain cases such lease may be for *twenty* years.

(*h*) Sect. 2.

such ecclesiastical persons (*i*); and also with respect to their mines, minerals, or quarries (*h*).

It is also provided by "The Capitular and Episcopal Estates Act" (14 & 15 Viet. c. 104), that ecclesiastical corporations may, with the approval of the Church Estate Commissioners, sell to their lessees the reversion of the corporation in the premises comprised in the lease; or may enfranchise any copyhold or customary land held of any manor belonging to the corporation; or may effect exchanges with their lessees; or may purchase the interest of such lessees, in any corporation lands, or the interest of any holder of copyhold or customary land belonging to such manor (*l*).

We have next, in order of time, to notice the "Ecclesiastical Leasing Act, 1858" (21 & 22 Viet. c. 57,)—by which it is provided, that the Ecclesiastical Commissioners may make lawful, by their approval under seal (such consents having been first obtained as in the Act mentioned), the lease of any part of the lands or other property of any ecclesiastical corporation, aggregate or sole, (except such as are in the Act specially excepted,) for such considerations, and for such terms, and under such covenants or agreements, on the part of the lessees, and generally in such manner, as to the said commissioners shall seem advisable.

It is however enacted by 23 & 24 Viet. c. 124, that no lands assigned by the Ecclesiastical Commissioners as the endowment of any see under that Act, shall be granted by the archbishop or bishop otherwise than from year to year, or for a term of years in possession not exceeding

(*i*) 5 & 6 Viet. c. 108, s. 4.

(*h*) Sect. 6. See Doe *v.* Brammall *v.* Collinge, 7 C. B. 954.

(*l*) This Act is explained, amended and continued by 17 & 18 Viet. c. 116; 22 & 23 Viet. c. 46; 23 & 24 Viet. c. 124; and 36 & 37 Viet. c. 75. See also 35 & 36 Viet. c. 88.

It is to be noticed that colleges and hospitals are not included within the provisions of these statutes; nor "any parson, vicar, perpetual curate, or other incumbent of a benefice." (See 14 & 15 Viet. c. 104, s. 11; 24 & 25 Viet. c. 105, s. 3.)

twenty-one years, at the best annual rent that can be reasonably gotten without fine; the lessee not to be punishable for, or exempted from liability in respect of, waste. And that in every such lease such or the like covenants, conditions, and reservations shall be entered into, reserved, or contained for the benefit of the archbishop or bishop and his successors, as under the 5 & 6 Vict. c. 27, are to be contained in a lease for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit (*m*). But there is a proviso that it shall be lawful for the archbishop or bishop, with the approval of the Church Estate Commissioners, to grant mining or building or other leases, for such periods, for such considerations, and generally in such manner as they may think fit; and that it shall be lawful for them to require that any portion of the rent reserved on any such lease, shall be payable to the Ecclesiastical Commissioners (*n*).

By 24 & 25 Vict. c. 105, (amended by 25 & 26 Vict. c. 52,) it is enacted that it shall not be lawful for any rector, vicar, perpetual curate or incumbent, who after the passing of the Act shall become possessed or entitled to any manors, lands, tenements, or hereditaments belonging to any ecclesiastical benefice, to lease or grant out the same in any other way than is authorized by the provisions of 5 & 6 Vict. cc. 27, 108; 14 & 15 Vict. c. 104; 21 & 22 Vict. c. 57, and 23 & 24 Vict. c. 124 (*o*).

The last statute connected with our present subject we propose to notice is the 26 & 27 Vict. c. 120. Its object is to enable the Lord Chancellor for the time being to

(*m*) Vide sup. p. 737.

(*n*) 23 & 24 Vict. c. 124, ss. 2—8.

(*o*) By 24 & 25 Vict. c. 105, s. 2, the rights of leasing, &c. possessed by present rectors, vicars, perpetual curates and incumbents are pre-

served during their respective incumbencies. *Prebendaries* (other than such as are of a cathedral or collegiate church) are also included in the Acts.

dispose of, by way of sale, the several advowsons enumerated in the schedule (all of them being benefices whereof the presentation is in his gift), and to apply the purchase-money or consideration, received in respect of each transaction, either in augmentation of the income of the benefice so sold, or of the income of other poor benefices remaining still in his gift (*p*).

Having thus endeavoured to explain the state of the law with respect to the endowments and provisions of the Church, properly so called, we shall conclude with some notice of certain profits of little comparative importance, but which, as forming a part (however trivial) of the revenues of the clergy, ought to be considered in connection with the subject of this chapter. We allude to those fees and dues which go by the name of *surplice fees* (being payable on burials, marriages, and the like); and to Easter offerings, and mortuaries: all which are mentioned generally in our books by the name of *oblations*, and are of great antiquity (*q*). Indeed, it is said, that voluntary oblations, (from which these probably emanated,) formed, with the produce of such lands as had been voluntarily bestowed, the whole revenue of the Church—until in the fourth century it was enriched with tithes (*r*).

With respect to the surplice fees, it is said that none are due to the minister as of common right, but that they depend upon special custom only (*s*): while as to Easter

(*p*) See also 35 & 36 Vict. c. 49, and 36 & 37 Vict. c. 50, as to the acceptance of church sites from private donors.

(*q*) With regard to *baptisms*, the demand of any fee or reward in respect of its celebration or of the registry thereof is prohibited by 35 & 36 Vict. c. 36.

(*r*) Jac. Law Diet. Oblations;

Rennell v. Bishop of Lincoln, 7 Barn. & Cress. 153. Vide sup. p. 723.

(*s*) 3 Bl. Com. 90; Com. Dig. Disines (B. 1); Burdeaux v. Lancaster, 1 Salk. 332; Andrews v. Cawthorne, Willes, 536; Littlewood v. Williams, 6 Taunt. 277; Gilbert v. Buzzard, 3 Phill. 360; Spry v. Gallop, 16 Mee. & W. 716.

offerings, on the other hand, it has been laid down that they are due of common right to him who exercises the spiritual functions of the parish; and that at twopence per head, for all the parishioners of the age of sixteen and upwards (*t*). However this may be, the liability to pay oblations generally is recognized by the statute law. For by 2 & 3 Edw. VI. c. 13, it was provided, that all who, by the laws and customs of the realm, ought to pay offerings, shall yearly pay them to the incumbent of the parish at the four most usual offering days; or otherwise at Easter; and by 7 & 8 Will. III. c. 6, and 53 Geo. III. c. 127, that every one shall henceforth pay all offerings, oblations, and obventions to those persons to whom they are due (*u*). And they are made recoverable before two justices of the peace, where their amount does not exceed 10*l.* (*x*). Moreover, in churches and chapels built under the Church Building Acts, or the “New Parishes Acts,” (of which we shall presently speak more at large,) the payment both of fees and offerings to the minister and clerk respectively, is specially regulated and secured (*y*).

As to *mortuaries*, (on which the learning is more copious,) they are a sort of ecclesiastical heriots (*z*), being

(*t*) *Laurence v. Jones*, Bunb. 173; *Egerton v. Still*, ib. 198. Other authorities for the proposition in the text are cited in *The Queen v. Hall*, Law Rep., 1 Q. B. 638, a case in which the court intimated that the common law liability as so stated was liable to argument.

(*u*) It has been held, however, that “mortuaries” do not come within the provisions of 7 & 8 Will. 3, c. 6. (*Ayrton v. Abbott*, 14 Q. B. 1.)

(*x*) In the case of Quakers the arrears are recoverable before the

justices to the amount of 50*l.* By the same statutes, and by 5 & 6 Will. 4, c. 74, and 4 & 5 Vict. c. 36, no offerings, or other ecclesiastical dues, can be recovered in the superior courts, or in the ecclesiastical courts, unless the amount shall exceed 10*l.* (or, in the case of Quakers, 50*l.*), or unless some matter of title comes in question.

(*y*) As to the Church Building Acts, vide post, p. 747; as to the New Parishes Acts, post, p. 750.

(*z*) 2 Bl. Com. p. 425. As to heriots, vide sup. vol. I. p. 648. It is to be observed that “mortuaries”

a customary gift claimed by and due to the minister, in very many parishes, on the death of his parishioners (*a*). [They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended (as Lydewoode informs us, from a constitution of Archbishop Langham), as a kind of expiation and amends to the clergy, for the personal tithes and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary (*b*). And therefore in the laws of King Canute this mortuary is called soul-seot (*ȝapȝceat*), or *symbolum animæ* (*c*).

It was antiently usual in this kingdom to bring the mortuary to church, along with the corpse when it came to be buried; and thence it is sometimes called a *corse-present*; a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry the third, we find it riveted into an established custom: insomuch that bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels (*d*). The custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till this was abolished, upon a recompence given to the bishop, by the statute 12 Ann. st. 2, c. 6. And in the Archdeaconry of Chester, a custom once prevailed, that the bishop should have at the death of every clergyman dying therein his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his

are not the same as "burial fees." (*b*) Co. Litt. 185. Provinc. l. 1, (Willes, 538 (n.)). And see the case tit. 3.

of Ayrton v. Abbott, 14 Q. B. l. (*c*) C. 13.

(*a*) None is due of common (*d*) Bract. l. 2, c. 26; Flct. l. 2, right, but by custom only. (2 Inst. c. 57. 491.)

[best signet or ring (*e*). But by statute 28 Geo. II. c. 6, this mortuary was directed to cease; and the Act settled upon the bishop an equivalent in its room (*f*).]

The variety of customs with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose it is enacted that all mortuaries or corse-presents to parsons of any parish shall be taken in the following manner; unless where by custom less or none at all is due; viz., for every person dying therein who does not leave goods to the value of ten marks, nothing; for every person who leaves goods to the value of ten marks and under thirty pounds, 3*s.* 4*d.*; if above thirty pounds, and under forty pounds, 6*s.* 8*d.*; if above forty pounds, of what value soever they may be, 10*s.* and no more. And that no mortuary shall be paid, in any parish, in respect of a *feme covert*; nor for any child; nor for any person not being a housekeeper therein; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish in which he had his usual residence. And upon this statute stands the law of mortuaries to this day (*g*).]

(*e*) See *Hinde v. Bishop of Chester*, Cro. Car. 237.

(*f*) 2 Bl. Com. p. 426.

(*g*) *Ib.* p. 427.

CHAPTER IV.

OF NEW ECCLESIASTICAL DISTRICTS AND PARISHES,
AND OTHER EXTENSIONS OF THE ORIGINAL CHURCH
ESTABLISHMENT.

THE constitution of the Church of England, in what regards its regular and proper establishment of prelates, ministers, churches and endowments, is, for the most part, as antient as the common law itself. But in modern times, and particularly of late, various alterations have been introduced, tending greatly to improve and enlarge that establishment—and we shall give some account of these in the course of the present chapter.

The spiritual ministrations of the Church are mainly entrusted to the parochial clergy—in other words, the rectors and vicars of the different parishes of which the realm is composed, together with the curates whom they may think fit to employ for their assistance (*a*). Each parish contains a church—the parochial division of the kingdom being indeed itself referential to the establishment of churches therein; every place in which a church has happened to be erected and endowed, having received from remote times the denomination of a parish (*b*). These parishes when first founded were presumably, in general, of a size and population proportioned to the establishment of

(*a*) As to perpetual curates, vide sup. p. 682.

(*b*) "*Parochia est locus in quo degit populus alicujus ecclesiæ.*" (Jeffrey's case; 5 Rep. 67 a.) As to

the formation of parishes and parish churches, vide sup. vol. i. p. 117; Hallam, Mid. Ages, vol. ii. p. 205, 7th edit.

the single church and minister thus respectively provided for them; and the number of them has, from a very early period, been such as to comprehend almost the entire realm—there being comparatively but very few and scanty portions of territory which have remained extra-parochial.

To the uniformity of this system the only exception was, that in certain parishes, together with the church, *chapels* were early founded, in which divine service, and (in some instances) the rites of sacrament and burial, might be lawfully celebrated, in the same manner as in the parochial churches themselves. These chapels are of various descriptions. Some are *private*(*c*), being erected for the use only of particular persons of rank, to whom this privilege was conceded by the proper authorities—while others are *public*, and designed for the benefit of particular districts lying within the parochial ambit(*d*). These last were, in general, founded at some period later than the parish church itself: and were designed for the accommodation of such of the parishioners as in course of time fixed their residence at a distance from its site; and chapels so circumstanced are described as *chapels of ease*, because built in aid of the original church(*e*). But there are some chapels of ease which seem to have been coeval with, and independent of, the parish church; and to have been designed for the benefit of some particular districts never included within its pale,

(*c*) As to private chapels and the freeholds therein, see *Chapman v. Jones*, Law Rep., 4 Exch. 273. See also 34 & 35 Viet. c. 66, an Act to amend and define the law relating to private chapels, and to such as belong to colleges, schools, hospitals, asylums and other public institutions; and enacting, that the minister thereof, so far as regards the performance of the services specified in

his licence, shall be subject to no control or interference on the part of the incumbent of the parish or district wherein the chapel is situate.

(*d*) *Godolph. Ab.* 145; *Farnworth v. Bishop of Chester*, 4 B. & C. 568.

(*e*) *Wats. C. L.* 645; *Farnworth v. Bishop of Chester*, *ubi sup.*; *Reg. v. Foley*, 2 C. B. 664.

though locally embraced by the parochial division (*f*). With respect to these chapels of ease—also called *chapels belonging to the mother church* (*g*)—they are either *parochial*, in which both divine worship and the rites of sacrament and burial are performed—or *mere* chapels of ease, and designed for divine worship only. But as to chapels of ease of either description, these doctrines equally prevail—that of common right the nomination to them is in the incumbent of the parish church, and cannot be taken from him except by agreement between himself, the patron and the ordinary (*h*); and that the establishment of a chapel of ease in any parish does not of itself deprive the inhabitants accommodated therein of the right of resorting to the parish church; nor, on the other hand, does it exempt them from any parochial burthen to which they would otherwise be liable (*i*).

To the number of chapels thus created in antient times considerable additions have been made in comparatively modern periods—many new chapels of ease (particularly in towns) having latterly been built and endowed, to meet the demands of a population beginning to overflow: and among these may be particularly noticed a species of recent introduction, called *proprietary chapels* (*k*); so called because they are the property of private persons,

(*f*) *Craven v. Sanderson*, 7 Ad. & El. 880.

(*g*) *Wats. C. L.* 645. As to making chapels of ease independent of the parish church, see 1 & 2 Will. 4, c. 38; 1 & 2 Vict. c. 107, s. 7. As to annexing thereto part of the parish tithes, 1 & 2 Will. 4, c. 45; 28 & 29 Vict. c. 42.

(*h*) *Farnworth v. Bishop of Chester*, 4 B. & C. 568; and see *Dixon v. Kershaw*, Amb. 528; *Duke of Portland v. Bingham*, 1 Hag. 168.

(*i*) *Ball v. Cross*, 1 Salk. 165; see *Dent v. Rob.* 1 You. & C. 1. In

chapels another distinction exists, with which it did not seem necessary to incumber the text. Some are *free chapels*, so called because not liable to the visitation of the ordinary, as churches and chapels generally are. These free chapels are always of royal foundation, or founded at least by private persons to whom the crown thought fit to grant the privilege. (*Wats. C. L.* ubi sup.; 1 Burn, E. L. 298.)

(*k*) *Moysey v. Hilcoat*, 2 Hag. 30.

who have purchased or erected them with a view to profit or otherwise (*l*).

But these casual additions to our regular establishment, though numerous, were not found adequate to the growing exigency of the case. And in 1818 the legislature began to apply itself, systematically, to the great object of extending the accommodation afforded by the national Church, so as to make it more commensurate with the wants of the people. In that year, and during the interval which has since elapsed, a variety of statutes have been passed for this purpose, which are known by the denomination of the Church Building Acts (*m*).

Under authority of these Acts the Crown appointed, for a limited period, a corporate body of commissioners, who were directed to ascertain where the accommodation of additional churches and chapels was required; and out of the funds placed at their disposal by parliament to cause such as they thought necessary to be built, or to assist the parishioners, or any persons subscribing, with grants or loans of money for the purpose. Other and extensive powers were also entrusted to these Commissioners, with respect to the division of parishes, (so far as ecclesiastical purposes were concerned,) into separate parishes or separate ecclesiastical districts—and also with regard to many other matters of the same general character.

As these statutes contain provisions vastly too numerous and complex for particular notice, and as their importance is in some directions partly superseded by the other more recent enactments, of which we are about to

(*l*) As to proprietary chapels, see *Bosanquet v. Heath*, 9 W. R., Q. B. 34.

(*m*) 58 Geo. 3, c. 45; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 2 & 3 Will. 4, c. 61; 1 & 2 Vict. c. 106, ss. 25, 80; c. 107; 2 & 3

Vict. c. 49; 3 & 4 Vict. c. 60; 4 & 5 Vict. c. 38, s. 19; 6 & 7 Vict. c. 37, s. 24; 7 & 8 Vict. c. 56; 8 & 9 Vict. c. 70; 9 & 10 Vict. cc. 68, 88; 11 & 12 Vict. c. 37; 14 & 15 Vict. c. 97; 17 & 18 Vict. c. 32; 32 & 33 Vict. c. 94; 34 & 35 Vict. c. 82.

speak, we shall content ourselves with stating, that in the year 1856, the powers of the Church Building Commissioners, after being long and largely acted upon, were transferred to “The Ecclesiastical Commissioners,”—another corporate body, of which the origin was as follows (*n*).

During the course of legislation upon church building and the division of parishes for ecclesiastical purposes that has been just described, the zeal of the nation was also gradually excited for the improvement of our ecclesiastical establishment in other particulars—and this, in the year 1835, resulted in an event of the utmost importance. This was the appointment of royal commissioners, directed to consider the state of the several dioceses with reference to the amount of their revenues and the more equal distribution of episcopal duties; to consider the state of the cathedral and collegiate churches, with a view to the suggestion of such measures as might render them most conducive to the efficiency of the established church—and, also, to devise the best mode of providing for the cure of souls, with special reference to the residence of the clergy in their respective benefices.

The persons acting under these commissions presented several reports, containing a variety of recommendations for improvement of our ecclesiastical system; and these were followed by an act of parliament, 6 & 7 Will. IV. c. 77, incorporating “The Ecclesiastical Commissioners of England” (*o*); and empowering them to lay before

(*n*) See 19 & 20 Vict. c. 55.

(*o*) As regards the Ecclesiastical Commissioners, see also the following statutes: 3 & 4 Vict. c. 113, s. 78; 4 & 5 Vict. c. 39; 6 & 7 Vict. c. 37, 77; 7 & 8 Vict. c. 94 (repealed as to sect. 17 by 23 & 24 Vict. c. 124, s. 1); 10 & 11 Vict. c. 108; 13 & 14 Vict. cc. 41, 94; 14 & 15 Vict. c. 104; 16 & 17 Vict. cc. 35, 50; 19 & 20 Vict. cc. 55,

104; 23 & 24 Vict. c. 124; 29 & 30 Vict. c. 111; 31 & 32 Vict. c. 114; 33 & 34 Vict. c. 39; 36 & 37 Vict. c. 64. By 13 & 14 Vict. c. 94, ss. 1, 3, there was formed out of these commissioners, a distinct committee termed “the Church Estate Commissioners,” to whom the sale, purchase and management of lands, and all similar matters are entrusted.

the sovereign in council, such Schemes as might be best adapted to carry the aforesaid recommendations into effect. And it was enacted that any such Scheme, when duly ratified by order in council, should have the same effect as if it had formed part of that Act (*p*).

In pursuance of this provision, the Ecclesiastical Commissioners—who now comprise other persons in addition to the original members, and include all the bishops of England and Wales, and the chief justices, as well as some other persons of distinction (*q*)—prepared a variety of such Schemes as above described; which have now acquired the force of legislative enactments (*r*). By these Schemes, and by the authority of occasional acts of parliament connected with them, various alterations have been made in the arrangement and limits of dioceses (*s*)—including the erection of the new sees of Ripon and Manchester (*t*), and the union of the sees of Gloucester and Bristol. And, in order to augment the income of the smaller bishoprics, contribution has been required to be made from time to time from the revenues of the larger, without prejudice however to the rights of existing prelates.

Among the general measures of Church reform, introduced in consequence of the recommendations of the commissioners appointed in 1835, are the provisions contained in 1 & 2 Vict. c. 106, as to the residence of the parochial clergy on their livings, and as to the law of pluralities and various other matters of which we have

(*p*) By 13 & 14 Vict. c. 94, s. 26, the Ecclesiastical Commissioners are required to lay an annual report before the Secretary of State (to be by him submitted to parliament) of all their proceedings for the current year.

(*q*) 3 & 4 Vict. c. 113, s. 78.

(*r*) See 31 Vict. c. 19, an Act confirming the validity of certain orders

in council ratifying schemes.

(*s*) See one of these, 26 & 27 Vict. c. 36. As to the effect upon the jurisdiction of the different Ecclesiastical Courts produced by alterations thus made, see 10 & 11 Vict. c. 98, continued by 35 & 36 Vict. c. 88.

(*t*) As to these sees, vide sup. vol. I. p. 116, n. (*b*), et sup. p. 667.

already given some account (*u*). There are also those which are contained in 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39. These statutes, which are commonly called the Cathedral Acts (*x*), among numerous other arrangements, provide for the suspension of a large number of canonries,—subject, in certain events, to a power of revival, upon condition of their being newly endowed (*y*): for the suppression of all sinecure rectories, except those in the patronage of private persons (*z*); for the suppression of certain deaneries (*a*); for the vesting of the estates and profits of all such preferments, together with the endowments of non-residentiary prebends, and some other dignities and offices, in the Ecclesiastical Commissioners (*b*); and for the consolidation of all the property so vested, with the accruing interest, into a common fund, to be applied, (in general, and under such authority as in the Acts provided,) in making additional provision for the cure of souls, in parishes where such assistance shall be most required (*c*).

But provisions of a not less important character and of still more recent date, in reference to the same great object of putting the Church into a state of full efficiency, are to be found in the 6 & 7 Vict. c. 37 (“The New Parishes Act, 1843”), the 7 & 8 Vict. c. 94 (“The New Parishes Act, 1845”) and the 19 & 20 Vict. c. 104 (“The New Parishes Act, 1856”). The second of these

(*u*) Vide sup. pp. 689, 691.

(*x*) See also 6 & 7 Vict. c. 77; 23 & 24 Vict. cc. 59, 124; 31 & 32 Vict. c. 114; and 36 & 37 Vict. c. 39.

(*y*) 3 & 4 Vict. c. 113, s. 20.

(*z*) Sects. 48, 54; 4 & 5 Vict. c. 39, s. 17. Provision is also made for suppressing sinecure rectories in private hands, with the concurrence of the patrons. (3 & 4 Vict. c. 113, s. 48.)

(*a*) Sects. 21, 51; 4 & 5 Vict. c. 39, s. 6.

(*b*) 3 & 4 Vict. c. 113, ss. 49, 51; 4 & 5 Vict. c. 39, ss. 6, 7.

(*c*) 3 & 4 Vict. c. 113, s. 67, extended by 23 & 24 Vict. c. 124, s. 12. See Report of Royal Commissioners to inquire into the state and condition of the Cathedrals and Collegiate Churches of England and Wales. This Report was published September, 1854.

Acts—relating to matters of detail only—it will be sufficient to have thus mentioned. But of the first and the last, some additional account may be here given (*d*).

The 6 & 7 Vict. c. 37, provides that the Ecclesiastical Commissioners may form out of the larger and more populous parishes separate districts for spiritual purposes. Any Scheme, however, with this object is to be first laid before the incumbent and patron, so as to give an opportunity for making such remarks or objections as may occur to them (*e*).

Upon the district being thus constituted, a minister is to be nominated thereto, with an income of not less than 100*l.* per annum (*f*): and the right of nomination may be assigned to any ecclesiastical corporation, or to the universities of Oxford, Cambridge, or Durham, or any of their colleges, or to any private person or his nominee or nominees,—upon condition of contributing, in a certain proportion, to the permanent endowment of the minister, or towards a church or chapel for the district (*g*); but until the patronage shall be so assigned, the right of nomination shall belong to her majesty and the bishop of the diocese alternately (*h*). The funds placed in the hands of the Ecclesiastical Commissioners are also made available for the purpose of endowing or augmenting the income of the ministers of the new districts to such an amount, and in such proportion and manner, as the Commissioners may recommend (*i*).

(*d*) As to the names given in the text to these Acts, see 19 & 20 Vict. c. 104, s. 35. The first two are also popularly known as Sir Robert Peel's Acts; and the last, as The Marquis of Blandford's. There is also an Act, 32 & 33 Vict. c. 94, passed in the year 1869, to amend the New Parishes and the Church Building Acts. Its provisions are chiefly in reference to the subject

of pews and sittings, to the consolidation of portions of two or more benefices held in severalty, and as to the assignment of patronage.

(*e*) 6 & 7 Vict. c. 37, s. 9.

(*f*) Ibid.

(*g*) Sect. 20.

(*h*) Sect. 21. And see 7 & 8 Vict. c. 94, s. 1.

(*i*) 6 & 7 Vict. c. 37, s. 19.

At any time after the constitution of such a district, and while it is still unprovided with a church, the bishop is also empowered to license any building within the same, for performance of divine service (*k*); and may license the nominated minister to perform in the district any pastoral duties, with the exception only of burials and marriages; and the minister so licensed shall be considered as having, to that extent, the cure of souls within the district, and that independently of the incumbent of the parish church (*l*): and he shall be a body corporate, with perpetual succession, by the style of the “minister” of such district. But after a church or chapel shall have been built or purchased for the district, approved by the Commissioners, by an instrument under their common seal, and duly consecrated,—the district shall (immediately upon such consecration) become a new *parish* for ecclesiastical purposes; and it shall thereupon become lawful to solemnize marriages, baptisms, churchings, and burials therein (*m*); and the minister, having been first duly licensed by the bishop to such church, shall thereupon *ipso facto* become the vicar thereof (*n*), and shall be endowed with an income of not less than 150*l.* *per annum* (*o*). And the new church shall be styled and designated a vicarage, and shall be deemed to be a benefice with cure of souls to all intents and purposes; and two fit persons, being members of the Church of England, shall be annually chosen, by the vicar and inhabitants of the new parish, as churchwardens; who shall be charged with all the ordinary duties of churchwardens in ecclesiastical matters, but not with any duties as overseers of the poor (*p*).

Under this Act, no district could be constituted if

(*k*) 6 & 7 Viet. c. 37, s. 13.

(*l*) Sect. 11.

(*m*) Sect. 15.

(*n*) See 31 & 32 Viet. c. 117, prior to which, such ministers were termed

“perpetual curates.” (As to this Act, vide *sup.* p. 682.)

(*o*) 6 & 7 Viet. c. 37, s. 9.

(*p*) Sect. 17.

there already existed within its limits any consecrated church or chapel in use for divine worship (*q*), but this restriction was taken away by the 19 & 20 Vict. c. 104, the latest of the three “New Parishes” Acts already referred to. By this last statute, the Ecclesiastical Commissioners are moreover empowered, on the constitution of any new district, to specify some existing or intended church within it, as the parish church thereof: and the incumbent of such church is made liable for the performance of all pastoral duties within the limits of the new parish (*r*). And the Commissioners are also empowered to recommend the constitution of such a district, without the permanent endowment required by the Act of 6 & 7 Vict. c. 37,—if it shall appear to them that there is reason to expect from other sources an adequate maintenance for the incumbent (*s*).

This last statute contains also a variety of additional enactments with regard to the assignment of patronage of these new churches, in return for endowment (*t*); but of a character too copious and complicated for detail in this place (*u*). It contains also provisions in extension of previous powers of the same general description under the Church Building Acts—whereby the Commissioners may, by Scheme ratified in council, divide *any* parish into two or more distinct and separate parishes for *all ecclesiastical purposes whatsoever*, and regulate the duties of the incumbents of the respective divisions, as also the performance of the offices and services in the respective churches, and the fees to be taken for the same respectively; and any other matter or thing which may become necessary or expedient by reason or in consequence of such change (*x*). Such division of a parish,

(*q*) 6 & 7 Vict. c. 37, s. 9.

(*r*) 19 & 20 Vict. c. 104, s. 2.

(*s*) Sect. 3. The commissioners may, with consent of the bishop, order that pew rents may be taken in any church to which a district

may be assigned, if other sources fail, but not otherwise. (Sect. 6.)

(*t*) Vide sup. p. 751.

(*u*) Sects. 16, 22.

(*x*) Sect. 25.

however, as here referred to, can only be made with the consent of the patron and bishop of the diocese, and is in no case to take effect until the next avoidance of the church, unless with the consent in writing of the actual incumbent thereof (*y*).

(*y*) 19 & 20 Vict. c. 104, s. 25. That heavily loaded branch of law which consists of recent improvements in our church system, comprises some enactments in the present reign, which have not been found capable of convenient ar-

rangement in the text of this chapter and the preceding ones of the present volume. They will chiefly be found in 1 & 2 Vict. cc. 106, 107; 2 & 3 Vict. cc. 30, 49; 14 & 15 Vict. c. 97.

END OF THE SECOND VOLUME.

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